No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HUGHES AIRCRAFT COMPANY AND HUGHES NON-BARGAINING RETIREMENT PLAN,

Petitioners,

v.

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN, AND RICHARD E. HOOK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 5, 1998

QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred by refusing to follow this Court's holding in *Lockheed Corp. v. Spink*, 116 S. Ct. 1783, 1790 (1996), that "the act of amending a pension plan does not trigger ERISA's fiduciary provisions."

2. Whether the Ninth Circuit erred by limiting *Spink* to plans funded only by employer contributions, even though that limitation is never mentioned in the Court's opinion, has no basis in law or logic, and has been rejected by other circuits.

3. Whether the Ninth Circuit erred by concluding, contrary to three other circuits, that participants in a defined-benefit plan have a legally-cognizable property interest not only in their defined benefits but also in the assets held by the plan.

4. Whether the Ninth Circuit erred by holding, contrary to three other circuits, that an ERISA plan may be forcibly terminated (and its assets distributed) by means not specified in ERISA's exclusive termination provisions.

PARTIES TO THE PROCEEDING

Petitioners Hughes Aircraft Company and Hughes Non-Bargaining Retirement Plan were the defendants/appellees below; respondents Stanley I. Jacobson, Daniel P. Welsh, Robert E. McMillin, Ernest O. Blandin, and Richard E. Hook were the plaintiffs/appellants.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Hughes Aircraft Company states that it recently merged with Raytheon Company. Following that merger, two corporations and two pension plans have an interest in this case: Hughes Electronics Corporation, Raytheon Company, Hughes Non-Bargaining Retirement Plan, and Raytheon Non-Bargaining Retirement Plan. All four of these entities were recently named as defendants in an amended complaint. For convenience's sake, however, only the entities identified in the original caption of the case and treated as defendants at the time of the Ninth Circuit's judgment — Hughes Aircraft Company and Hughes Non-Bargaining Retirement Plan — are referenced in this petition.

Hughes Electronics Corporation ("HEC") is a wholly-owned subsidiary of General Motors Corporation, which has issued various classes of shares to the public. The earnings of HEC are used to calculate the earnings per share of General Motors Class H common stock. The following are non-wholly owned subsidiaries of HEC that have issued shares to the public: American Mobile Satellite Corporation; PanAmSat Corporation; FLIR Systems, Inc.; and Nippon Avionics Co., Ltd. HEC also has the following non-wholly owned subsidiaries that have not issued shares to the public: Hughes Ispat Limited; Hughes Escorts Communications Limited; Hughes-Kenwood RDSS Inc.; Hughes Olivetti Telecom, Ltd.; Shanghai Hughes Network Systems; Satelitron S.A. de CV; PT Pasific Satelite Nusantara; DIRECTV Japan Kabushiki Kaisha; Galaxy Entertainment de Venezuela, C.A.; Servicitos Galaxy Sat III R, C.S.; and SurFin, Ltd.

Raytheon Company issues shares to the public. It does not have a parent company. The non-wholly owned subsidiaries of Raytheon Company have not issued shares to the public. They are: RAYCOM, INC.; Raytheon Appliances, S.A.; Constellation Communications, Inc.; Space Imaging, Inc.; Raytheon Saudi Arabia Limited; DISA-Raytheon Ingenieria y Construccion, S. de R.L. de C.V.; Instrumentation Service, S.A.; Litwin S.A.; Polytec, S.A.R.L.; Raytheon Engineers & Constructors France S.a.r.l.; Raytheon Engineers & Constructors Italy S.r.l.; Secore Services Incorporated; Stearns Catalytic Ingenieria y Construccion Chile Limitada; Raytheon do Brasil Comercio Ltda.; Gesellschaft fuer Verteidgungs Systeme mbH; Systems For Defense Company; Raytheon Philippines, Inc.; Standard Missile Company, L.L.C.; Switchcraft Far East Company, Ltd.; Thoray Electronics Corporation; ACCSCO S.A.; HE Microwave; Advanced Toll Management Corp.; Serampang Hughes Sdn Bhd; Empresa Nacional de Optica S.A.; Gulf Industrial Technology Co.; Hughes Arabia Limited; Hughes Research Laboratories; UKADGE Systems Limited; International Electro-Optical Industry Anonim Sirkell; Standard Missile Co. LLC.; Air Command System International S.A.S.; AMRAAM International Licensing Company; ERAPSCO; H & R Company; Harris-Magnavox Systems Company; Lifestar Digital Television, Inc.; IRISS Company; Hughes Pareto Research Partnership; HMK; HKV; SJ & LA Associates.

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

As Judge William Norris explained in his dissent below, this lawsuit is all about respondents' quest for a "pot of gold" to which they are not entitled. App. 27a. By authorizing that quest, the Ninth Circuit (1) flouted this Court's recent decision reversing that circuit in *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996); (2) effected a revolution in the law of employee benefits without any basis in law or logic; and (3) brought itself (once again) sharply into conflict with other circuits. Summary reversal or plenary review by this Court is urgently needed to prevent the havoc that the decision below, if allowed to stand, would wreak across a vast expanse of employee-benefit law.

Respondents are retired employees who are participants in petitioner Hughes Aircraft Company's Non-Bargaining

Retirement Plan. The Plan is a defined-*benefit* plan, which guarantees participants a fixed (or "defined") level of benefits regardless of the plan's investment success or failure. Such a plan is fundamentally different from a defined-*contribution* plan, in which contributions are fixed and plan participants receive whatever investment returns those contributions generate.

The Hughes Plan has invested its assets wisely, with excellent results. This lawsuit is an attempt by Plan participants to grab those investment returns for themselves, even though they are entitled only to the defined benefits that they are concededly receiving. To this end, respondents assert that Hughes violated various provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") by amending the Plan in 1989 and 1991, and that the latter amendment effected a termination of the Plan requiring immediate distribution of all Plan assets.

The District Court rejected respondents' extraordinary attempt to lay claim to more than their defined benefits. A divided Ninth Circuit panel reversed. In doing so, the majority (Judges Pregerson and Fletcher) swung a wrecking ball through ERISA law, provoking a vigorous dissent from Judge Norris.

The majority erred in three basic respects:

First, the majority refused to follow *Spink*. In reversing a previous attempt by the Ninth Circuit to impose fiduciary duties on ERISA plan sponsors, this Court squarely held that "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." *Spink*, 116 S. Ct. at 1789. The majority below limited *Spink* to plans funded entirely by employers, and declared it inapplicable to plans (like this one) "funded by both employer and employee contributions" (so-called "contributory" plans). App. 14a.

This Court's reasoning in *Spink*, however, had nothing whatsoever to do with the source of plan funding. Indeed, nowhere in this Court's opinion is there any mention whether

the plan at issue was contributory or non-contributory. Thus, as Judge Norris explained, the majority relied upon a "false" distinction to circumvent *Spink*. *Id.* at 37a. That asserted distinction, moreover, brought the Ninth Circuit squarely into conflict with the Third, Sixth, Seventh, and Tenth Circuits, each of which has held — in the specific context of contributory plans — that amendments to ERISA-covered plans do not implicate the statute's fiduciary duties. As a practical matter, moreover, the decision below threatens to unsettle the law governing *all* contributory plans — including not only pension plans but also such familiar employee-benefit plans as 401(k) plans and medical plans.

Second, the majority blurred the critical distinction between defined-benefit and defined-contribution plans. By mistakenly embracing the premise underlying all of respondents' claims — that they have a property interest not only in their defined *benefits* but also in Plan *assets* — the Ninth Circuit brought itself into direct conflict with at least the Second, Third, and Seventh Circuits, each of which has rejected similar attempts by plan participants to claim ownership of assets held by defined-benefit plans to which employees have contributed. *See, e.g.*, *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1190 (7th Cir. 1994).

Third, the decision below reopens, and incorrectly decides, another very important and previously settled issue — whether Title IV of ERISA provides the exclusive means of terminating a defined-benefit plan. In order to obtain a distribution of Plan assets, respondents seek a judicial declaration that the Plan was terminated in 1991. The Ninth Circuit initially stated that "because ERISA does not define when a termination occurs, . . . it is appropriate for a court to look to trust principles to determine when a termination occurs." App. 11a n.3. But ERISA indisputably *does* define when termination occurs, and, indeed, Congress specifically amended the statute in 1986 to clarify that Title IV of ERISA sets forth the "[e]xclusive means of plan termination." 29 U.S.C. § 1341. When Hughes pointed

out this error in its rehearing petition, the Ninth Circuit simply deleted its manifestly incorrect reasoning, but refused to recede from its holding that respondents could proceed with their claim that the Plan had terminated outside the statutory framework.

That holding conflicts with decisions of the Third, Fourth, and Fifth Circuits, all of which agree that Title IV of ERISA provides the exclusive means for terminating a defined-benefit plan. If allowed to stand, the decision below would transform virtually any amendment to a benefit feature of an ERISA-covered plan into a litigable claim that the plan has been terminated and that plan assets must be distributed immediately. As a practical matter, that holding makes plan amendments very perilous, if not impossible.

To correct these serious misinterpretations of ERISA, this Court should either summarily reverse the Ninth Circuit or grant plenary review of the questions presented by this petition.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 105 F.3d 1288 (1997), and is reprinted in the Appendix ("App.") at 1a-48a. The order amending the opinion and denying the petition for rehearing and suggestion for rehearing *en banc* is reported at 128 F.3d 1305 (1997), and is reprinted at App. 49a-50a. A subsequent order clarifying the amendment order is reported at 1998 WL 23252, and is reprinted at App. 51a-52a. For this Court's convenience, the passages of the opinion deleted by the amendment order are indicated with strikeout text. The District Court's unpublished judgment and order granting petitioners' motion to dismiss are reprinted at App. 53a-63a.

JURISDICTION

The Ninth Circuit entered judgment on January 23, 1997. Petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc*; the Ninth Circuit denied both on October 23, 1997. Justice O'Connor granted an extension of

the time for filing this petition to and including February 5, 1998. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The statutory provisions involved in this case are set forth at App. 65a-129a.

STATEMENT OF THE CASE

A. The Hughes Plan

Petitioner Hughes Aircraft Company manufactures aerospace and electronics equipment. Since 1955, it has sponsored the pension plan at issue in this case, petitioner Hughes Non-Bargaining Retirement Plan, for its employees. *See* App. 134a.

Two of the Plan's features are pertinent here. *First*, the Plan is a defined-benefit plan: participants are guaranteed a fixed level of benefits upon retirement regardless of the Plan's investment success or failure. *Second*, until 1991, the Plan was entirely contributory: it was funded by contributions from the employees as well as from Hughes. The latter feature was amended on January 1, 1991; since then, the plan is only partly contributory. New participants in the Plan no longer make contributions, and are entitled to a correspondingly lower level of benefits upon retirement. Plan participants who retired prior to the 1991 amendment continue to receive the higher level of defined benefits; plan participants who had not yet retired as of January 1, 1991, could choose between the contributory and non-contributory benefit structures. *See id.* at 138a. Even after the 1991 amendment, more than 66,000 Hughes employees have continued to accrue or receive benefits under the original contributory benefit structure. *See id.* at 146a-47a.

According to respondents, the Plan's assets came to exceed its accrued liabilities by more than $1 billion by the late 1980s. *See id.* at 136a. In 1987, Hughes suspended its contributions to the Plan. *See id.* at 132a, 137a. In 1989, the company

amended the Plan to provide special early retirement incentives, which entitled certain active employees to improved pension benefits if they elected to retire. *See id.* at 137a-38a.

B. The Jacobson Complaint

Respondents are five retired Hughes employees and Plan participants. They filed this lawsuit in 1992, alleging that they are entitled not only to their defined benefits under the Plan, but also to any and all "excess" assets in the Plan. *See id.* at 131a, 141a. The complaint also alleged that "the Plan was terminated on January 1, 1991," the date of the amendment creating the non-contributory benefit structure, and asked the court to order "an equitable distribution of the surplus assets" as of that date. *See id.* at 132a, 138a.

Specifically, respondents advanced six different claims charging that Hughes violated ERISA by amending the Plan to create the early retirement program in 1989 and the non-contributory benefit structure in 1991. The first claim alleged that both these amendments violated ERISA's "anti-inurement" provision, 29 U.S.C. § 1103(c)(1), because they entailed use of "excess Plan assets" for the benefit of the employer rather than Plan participants. *See* App. 139a. The second, fifth, and sixth claims alleged that the amendments involved a breach of Hughes' fiduciary duties under ERISA, 29 U.S.C. §§ 1104, 1106, for the same reason. *See* App. 139a, 141a-43a. The third claim alleged that the 1991 amendment deprived Plan participants of vested, nonforfeitable benefits in violation of 29 U.S.C. § 1053(a). *See* App. 139a-40a. The fourth claim alleged that the 1991 amendment had "terminated" the Plan, and that Hughes had violated ERISA by failing to distribute to Plan participants all "surplus" Plan assets as of January 1, 1991. *See id.* at 140a-41a.

As relief, the complaint requested (1) an equitable distribution of "all excess Plan assets" to Plan participants, *see id.* at 143a; (2) an injunction prohibiting the use of Plan assets to pay benefits under the non-contributory structure, *see id.*;

(3) the appointment of a new trustee to administer the Plan, *see id.*; (4) an order requiring Hughes to restore all Plan assets that had been used to pay benefits under the early retirement program and non-contributory benefit structure, *see id.*; and (5) an award of attorneys' fees, *see id.*

C. The District Court Proceedings

The District Court (Gadbois, J.) dismissed the complaint for failure to state a claim upon which relief could be granted. *See* App. 53a-63a. The court held that respondents' claims to all or part of any investment "surplus" were meritless because "unless and until a Plan termination occurs, plaintiffs are entitled to nothing other than the Plan's defined benefits." *Id.* at 55a-56a. And no termination occurred here as a matter of law because "plan terminations must be accomplished pursuant to the rules specified in 29 U.S.C. § 1341." App. 59a. The District Court also emphasized that participants in defined-benefit plans do not have any "right" to surplus assets, "but instead [are] entitled to the defined benefit," *id.* at 56a, and that an employer's fiduciary duties are not implicated by plan amendments, *see id.* at 57a-58a, 60a-62a. Respondents appealed.

D. The Ninth Circuit Proceedings

A divided panel of the Ninth Circuit reversed. *See* App. 1a-48a.

The majority first held that this Court's holding in *Spink* that "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries" under ERISA, 116 S. Ct. at 1789, does not apply to plans (like this one) that are funded in part by employee contributions. *See* App. 7a-9a.

Next, the majority held that, while (under *Spink*) "an employer may have the discretion to decide how to use an asset surplus attributable solely to *employer* contributions," where a plan is funded by both employer and employee contributions, an employer does not have the discretion to restructure the plan

in a manner that benefits either itself or employees who have not yet participated in the plan. App. 10a (emphasis in original). According to the panel, by amending the Plan in ways that allegedly benefitted itself, Hughes may have violated 29 U.S.C. § 1103, which provides that "assets of a plan shall never inure to the benefit of any employer." App. 11a-12a.

Next, the majority held that respondents had a "vested right" to the income generated by their contributions if that income exceeded their defined benefits under the Plan. *Id.* at 18a. Accordingly, the majority held that Hughes' amendments to the Plan may have violated the vesting and nonforfeiture requirements of 29 U.S.C. § 1053. *See* App. 21a.

Finally, the majority held that respondents were entitled to pursue their claim for an immediate distribution of Plan assets on the theory that Hughes had "terminated" the Plan. The majority held that whether Hughes had terminated the Plan in 1991 by creating an additional benefit structure was not a pure question of law that could be resolved on a motion to dismiss. *See id.* at 10a-11a & n.3, 21a, 22a-23a. The majority directed the District Court to develop the record to determine whether the 1991 amendment had converted the Plan into a "wasting trust" and thereby effected a "constructive termination" of the Plan. *Id.* at 11a n.3.

The majority gave two reasons for this holding. *First*, the majority cited a pre-ERISA Treasury Department regulation stating that "[w]hether a plan is terminated is generally a question to be determined with regard to all the facts and circumstances in a particular case." *See* App. 11a n.3 (quoting 26 C.F.R. § 1.401-6(b)(1)); App. 22a (same). *Second*, the majority held that "[b]ecause ERISA does not define when a termination occurs, we believe it is appropriate for a court to look to trust principles to determine when a termination occurs." App. 11a n.3.

Judge Norris dissented. He explained that this case was governed by *Spink*, and that the distinction advanced by the majority — that *Spink* "involved an amendment to a non-contributory plan, while this case involves an amendment to a contributory plan" — provided "no basis whatsoever" for disregarding that controlling authority. App. 36a.

Judge Norris further concluded that, in any event, the challenged amendments could not possibly have violated any duties under ERISA. He explained that participants in a defined-benefit plan are entitled *only* to their defined benefits, and have no statutorily-protected property interest in any investment return on contributions to the plan (regardless of whether those contributions were made by them, their employers, or both). *See id.* at 40a, 42a. Judge Norris also emphasized that ERISA's anti-inurement and fiduciary-duty provisions are not implicated by the amendment of a pension plan. *See id.* at 30a-32a, 40a, 44a-47a. "It is understandable that the plaintiffs (and their lawyers) covet the financial gains that resulted from the successful investment strategy that dramatically increased the value of the Plan's assets in the 1980s. But that does not diminish the reality that they have failed to state a legally cognizable claim." *Id.* at 48a.

Judge Norris also challenged the majority's holding that the question whether the 1991 amendment terminated the Plan was not a pure question of law. Judge Norris correctly emphasized that no relevant facts were in dispute. Rather, the only matter in dispute was whether the 1991 amendment "terminated" the plan — a question on which no factual development was necessary or appropriate. Judge Norris pointed out that "as a matter of law" "the Plan was not terminated by the addition of a non-contributory benefit structure." *Id.* at 44a; *see also id.* at 39a ("[T]his is a pure question of law."). Thus, as Judge Norris concluded, "there is no basis in ERISA, the caselaw, or logic for the majority's decision that in amending its pension plan, Hughes effectively terminated the plan." *Id.* at 48a.

Hughes filed a petition for rehearing and suggestion for rehearing *en banc*. The Ninth Circuit denied the petition, but the panel amended its opinion in two respects. *See id.* at 49a-

50a. *First*, the panel deleted the sentence justifying recourse to the common law of trusts on the ground that "ERISA does not define when a termination occurs." *Id.* at 49a, 11a. The court, however, did not recede from its holding that respondents were entitled to rely on the common law of trusts as the basis of their theory that the Hughes Plan had been "terminated" in 1991. *Second*, the panel deleted one of its two references to the obsolete Treasury Department regulation in support of its holding that the question of plan termination is not a pure question of law. *Id.* at 50a, 22a-23a. Again, however, the panel did not recede from that holding.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Erred by Creating Special Nonstatutory Limits on an Employer's Discretion to Amend One Particular Type of Employee-Benefit Plan — a Contributory Plan.

The Ninth Circuit plainly erred by refusing to follow this Court's recent decision in *Spink*, and instead devising special nonstatutory limits on an employer's discretion to amend one particular type of employee-benefit plan — a contributory plan.

As this Court has emphasized, ERISA grants employers broad discretion to design and amend their employee-benefit plans. *See, e.g., Spink*, 116 S. Ct. at 1788-90. Employers are not required to establish such plans in the first instance. *See id.* at 1788. If an employer does choose to provide a benefit plan, it is free to choose the amount of benefits provided. *See id.* After the plan is created, the employer retains broad discretion to amend or terminate it, including discretion to alter or eliminate benefit features. *See* 29 U.S.C. §§ 1341, 1342; *Spink*, 116 S. Ct. at 1789-90; *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); *American Flint Glass Workers Union v. Beaumont Glass Co.*, 62 F.3d 574, 579 (3d Cir. 1995). The reason for these rules is apparent: depriving the employer of discretion over the design or amendment of a plan would provide a strong disincentive to establish such a plan in the first

place. *See, e.g., Heath v. Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995).

The decision below eviscerates these fundamental and well-established principles. The Ninth Circuit held that employers do *not* have discretion to amend one particular, and quite common, type of benefit plan — a contributory plan, *i.e.*, a plan funded in whole or in part by employee contributions. That revolutionary holding has no basis in ERISA, and replaces the plain statutory text with uninformed judicial policymaking.

A. The Ninth Circuit Refused to Follow This Court's Recent Decision in *Spink*.

The decision below represents an unsubtle attempt to circumvent the controlling authority of *Spink*. This Court expressly held in that case that "the act of amending a pension plan does not trigger ERISA's fiduciary provisions." 116 S. Ct. at 1790. Notwithstanding that unambiguous holding, the Ninth Circuit authorized respondents to proceed with their claims that Hughes' 1989 and 1991 amendments to the Plan violated ERISA's fiduciary provisions. *See* App. 13a-18a, 23a-25a.

The Ninth Circuit thereby flouted *Spink*. Indeed, the fiduciary-duty claim in *Spink* was the same as the one here: that an employer had breached its fiduciary duties under ERISA by amending a defined-benefit plan to use plan assets for its own benefit rather than for the exclusive benefit of plan participants. *See* 116 S. Ct. at 1787. The Ninth Circuit had held in *Spink* — in disagreement with nine other circuits — that a plan sponsor should be held to fiduciary standards when providing a new pension benefit. *See Spink v. Lockheed Corp.*, 60 F.3d 616, 622-24 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1783 (1996). This Court unanimously reversed that holding, explaining that "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." 116 S. Ct. at 1789.

The majority below evaded that holding by limiting *Spink* to plans that do not include any employee contributions (*i.e.*,

"non-contributory" plans). "If employees contribute to the plan, the employer has a fiduciary duty to the employees when it amends the plan to use an asset surplus." App. 14a; *see also id.* at 25a (same).[1] As Judge Norris pointed out, however, that distinction between non-contributory and contributory plans is wholly contrived. *See id.* at 46a ("The majority's holding cannot be squared with [*Spink*], nor with cases from two other circuits which have held that pension plan amendments that create retirement windows with incentives for early retirement do not violate [ERISA's fiduciary-duty provisions.]") (citing *Belade v. ITT Corp.*, 909 F.2d 736, 737-38 (2d Cir. 1990), and *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988)).

Even a cursory review of *Spink* ratifies Judge Norris' view. This Court's reasoning was based not on the nature of the *plan* at issue, but instead on the nature of the *employer actions* at issue. The Court observed that its decision turned on the statutory definition of "fiduciary," which conspicuously omits any reference to plan design or amendment. *See* 116 S. Ct. at 1789. As a result, the Court explained, actions relating to plan administration implicate fiduciary duties while actions relating to plan design or amendment do not. *Id.* The Court also emphasized that ERISA's definition of a fiduciary "speaks simply of a 'fiduciary with respect to a plan,'" and does *not* distinguish between different types of plans. *Id.* at 1789-90 (quoting 29 U.S.C. § 1002(21)(A)).

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[1] The Ninth Circuit also asserted that Hughes fell within the statutory definition of a "fiduciary" because it "dispos[ed]" of plan assets in amending the plan. *See* App. 16a. That assertion is plainly refuted by *Spink*. The *Spink* Court expressly held that "'[the] defined functions [in the definition of fiduciary] do not include plan design.'" 116 S. Ct. at 1789 (quoting *Siskind v. Sperry Retirement Program*, 47 F.3d 498, 505 (2d Cir. 1995)) (brackets in original). Accordingly, amendments or changes in plan design are simply not covered by ERISA's fiduciary provisions, regardless of whether they could be said to involve some "disposition" of plan assets.

Indeed, nowhere in *Spink* did this Court even mention whether the plan was contributory or non-contributory. Thus, the Ninth Circuit majority sought to "distinguish" *Spink* on a basis that not only contravenes the rationale of that case, but is not even supported by this Court's description of the relevant plan. Thus, as Judge Norris aptly concluded, "there is no basis whatsoever for limiting the precedential value of [*Spink*] to non-contributory plans." App. 36a.

Moreover, the Ninth Circuit's ostensible distinction between contributory and non-contributory plans is meaningless. The only practical difference between the two types of plans is whether the employer funds them *directly*, through contributions to the plan, or *indirectly*, through wages paid to employees that the employees then contribute to the plan. "In terms of economic reality, it should make no difference whether an employee makes contributions to a plan directly, or whether the employee makes contributions indirectly through the employer. Either way, the contributions are the economic product of the employee's services." *Id.* at 37a (Norris, J., dissenting).

The Ninth Circuit's nonstatutory distinction between contributory and non-contributory plans is particularly inappropriate in the context of a statute as "comprehensive and reticulated" as ERISA. *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980). As this Court has emphasized, ERISA "is an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests — not all in favor of potential plaintiffs." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). Courts must be especially reluctant to "tamper" with a statute "crafted with such evident care." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985).

In short, *Spink* cannot fairly be limited to non-contributory plans. The Ninth Circuit's refusal to follow controlling authority is grounds for summary reversal.

B. The Ninth Circuit's Distinction Between Contributory and Noncontributory Plans Brings It into Conflict with the Third, Sixth, Seventh, and Tenth Circuits.

Even if *Spink* could be limited to non-contributory plans, the decision below would still merit review because it conflicts with decisions from at least four other circuits holding — in the specific context of *contributory* plans — that plan amendments do not implicate ERISA's fiduciary duties.

For example, the Seventh Circuit has held, in a case involving a contributory defined-benefit plan, that "[w]hen making the amendments, [the employer] dealt with the plan as settlor, not as trustee." *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994) (cited with approval in *Spink*, 116 S. Ct. at 1789). The Third Circuit has adopted the same approach and reached the same result, again in the specific context of contributory defined-benefit plans. *See Malia v. General Elec. Co.*, 23 F.3d 828, 833 (3d Cir.) (holding that ERISA's fiduciary duties "do not attach to business decisions related to modification of the design of a pension plan"), *cert. denied*, 513 U.S. 956 (1994); *Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 225 (3d Cir. 1989) (same); *see also Trenton*, 832 F.2d at 809.

The Sixth and Tenth Circuits have held likewise in the specific context of contributory plans. *See Musto v. American Gen. Corp.*, 861 F.2d 897, 912 (6th Cir. 1988) ("The case law . . . makes it clear that when an employer decides to establish, amend, or terminate a benefits plan . . . its actions are not to be judged by fiduciary standards."), *cert. denied*, 490 U.S. 1020 (1989); *Salazar v. Sandia Corp.*, 656 F.2d 578, 580 (10th Cir. 1981) (no fiduciary duty applies when an amendment to a defined-benefit plan causes it to become non-contributory and plan participants continue to receive their promised benefits).[2]

C. The Ninth Circuit's Decision Would Adversely Affect All Kinds of Employee-Benefit Plans.

The Ninth Circuit's holding that ERISA imposes special nonstatutory limits on an employer's discretion to amend contributory plans also has far-flung practical implications. Such plans include not only pension and other retirement plans, but also health plans, disability plans, and a wide range of other welfare plans for employees.

The decision below establishes that contributory plans are governed by a special body of unwritten law, and employers can only guess what new obligations the courts will retroactively impose on them in future cases. Employer actions that are indisputably legal with respect to non-contributory plans — such as the sort of routine amendments at issue here — are suddenly open to legal challenge. As a result, employers can no longer assume that the settled body of ERISA law (including *Spink*) will apply to any plan to which employees have contributed.

The practical consequences of the ruling below are staggering. Contributory plans are common: more than 60% of all health plans, nearly all savings and thrift plans, and many defined-benefit pension plans require or allow employee contributions.[3] As a result, the Ninth Circuit's special rules for

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[2] The Second Circuit's decision in *Belade*, cited by Judge Norris, held without qualification that an employer's decision to use plan assets to fund an early retirement program does not violate any fiduciary duty under ERISA, without even mentioning whether the plan at issue was contributory or non-contributory. *See* 909 F.2d at 737-38.

[3] *See* U.S. Dept. of Labor, Bureau of Labor Statistics, *Employee Benefits in Medium and Large Private Establishments, 1993*, Bulletin 2456 (Nov. 1994) at 49; General Accounting Office, *Employment-Based Health Insurance: Costs Increase and Family Coverage Decreases*, GAO/HEHS-

(continued...)

contributory plans would become the norm, not the exception. Even if the damage could be limited to contributory defined-benefit pension plans, moreover, the consequences would still be extraordinary: such plans cover more than 1 million American workers and retirees, and hold more than $60 billion in assets. *See* App. 149a-50a.

Under ERISA's broad provisions for service of process and venue, moreover, it is impossible to limit these adverse effects to the geographical confines of the Ninth Circuit. *See* 29 U.S.C. § 1132(e)(2). The statute confers nationwide jurisdiction for service of process, *see, e.g., Bellaire Gen. Hosp. v. Blue Cross & Blue Shield of Mich.*, 97 F.3d 822 (5th Cir. 1996), and allows a lawsuit to be brought in any district where the plan is administered, where the breach took place, or where a defendant resides or may be found, *see, e.g., Varsic v. United States Dist. Ct.*, 607 F.2d 245, 248 (9th Cir. 1979). Thus, most of the nation's major sponsors of ERISA-covered plans (including pension, medical, disability, and other welfare plans) now confront the risk that all of their actions with respect to their plans will be subjected to judicial review under the unprecedented standards imposed below.

II. The Ninth Circuit's Decision Blurs the Distinction Between Defined-Benefit and Defined-Contribution Plans, Thereby Conflicting with Other Circuits and Threatening the Stability of Defined-Benefit Plans.

The decision below rests, at bottom, on the erroneous premise that respondents have a property interest not only in their defined benefits under the Plan, but also in the assets held by the Plan. Respondents are concededly receiving their defined benefits; the challenged amendments in no way affect those benefits. Rather, respondents contend that their property

[3] (...continued)
97-35 (Feb. 1997) at 8; U.S. Dept. of Labor, Bureau of Labor Statistics, *Employee Benefits in Medium and Large Private Establishments, 1995* (press release, July 25, 1997) at 2; App. 149a-50a.

rights extend to the Plan assets, and that the challenged amendments violated those rights. By accepting that contention, the Ninth Circuit revealed a basic misunderstanding of pension plans, brought itself squarely into conflict with the holdings of other circuits, and threatened the very policies underlying ERISA.

"A 'defined benefit pension plan,' as its name implies, is one where the employee, upon retirement, is entitled to a *fixed* periodic payment." *C.I.R. v. Keystone Consol. Indus.*, 508 U.S. 152, 154 (1993) (emphasis added). The plan must pay employees their defined benefits regardless of its investment success or failure; if the plan is underfunded, the employer must make up the difference. A defined-contribution plan, in contrast, is one where "the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide." *Nachman*, 446 U.S. at 364 n.5 (internal quotation omitted). The benefits paid are wholly dependent on the plan's investment success or failure; if the plan fares poorly, the employees' benefits will be reduced accordingly. The investment risk in a defined-benefit plan thus rests upon the employer, whereas the investment risk in a defined-contribution plan rests upon the employees. *See, e.g., Georgia-Pacific*, 19 F.3d at 1186.

Thus, as Judge Norris explained below, the amendments challenged in this case did not affect respondents' "rights," because respondents had no rights in the Plan assets, but only in the defined benefits that they were concededly receiving. App. 30a. Whether a defined-benefit plan has a surplus or a deficit at any given moment prior to plan termination is of no consequence to plan participants — regardless of the plan's financial health, they are entitled to their defined level of benefits, no more and no less. *See, e.g., Georgia-Pacific*, 19

F.3d at 1189-90.[4] The amendments at issue here, accordingly, could not possibly have violated ERISA's fiduciary, anti-inurement, vesting, or other provisions.

Other courts of appeals have squarely rejected similar attempts to convert a contributory defined-benefit plan into a defined-contribution plan. The Seventh Circuit's *Georgia-Pacific* opinion is a particularly good example. That case, like this one, involved a contributory defined-benefit plan. *See* 19 F.3d at 1185 & n.†. The employer there amended the plan as part of an effort to resist a hostile takeover; under the amended plan, a change in control of the company would trigger an increase in benefits to current employees sufficient to exhaust any surplus assets accumulated under the plan. *See id.* at 1185-86. The takeover succeeded, the current employees' benefits were increased, and the plan assets were depleted. The retired employees sued, alleging that the employer's amendment of the plan to use the plan assets for its own ends violated ERISA's fiduciary provisions. There, as here, the crux of the plaintiffs' argument was that "they 'owned' the surplus," in light of their contributions to the plan, and that the employer unlawfully "gave away 'their assets'" by amending the plan to deplete the plan assets in a manner that did not benefit them. *Id.* at 1189; *see also id.* at 1186 ("What this suit depends on is a cry of 'Not with our money, you don't!'").

[4] The only exception to this general rule is expressly created by the statute itself: regardless of the level of defined benefits, employees have a "vested right" to receive benefits equal to their mandatory contributions plus an imputed rate of interest. 29 U.S.C. §§ 1053(a)(1), 1054(c)(2). These vesting provisions ensure that employees cannot receive less than they would have made by putting their money in a conservative, interest-bearing account, thus preventing employers from requiring employees to contribute to a plan in exchange for an unfairly low level of defined benefits, as measured by a defined *interest* rate. Nowhere, however, does ERISA authorize or entitle employees to receive any of the additional *investment* return that may have been generated by their mandatory contributions.

The Seventh Circuit, per Judge Easterbrook, squarely rejected the plaintiffs' claim. The *Georgia-Pacific* opinion, in sharp contrast to the opinion below, both recognized and emphasized the fundamental distinction between defined-benefit and defined-contribution plans. *See* 19 F.3d at 1186-87, 1189-90. "[T]he retirees do not own the assets of a defined-benefit pension plan. Their contributions purchased not a pool of assets (as would be the case with a defined-contribution plan) but a promise of benefits." *Id.* at 1186. An employer's use of plan assets in a defined-benefit plan, the court held, simply did not implicate ERISA's fiduciary duties because plan participants had no property interest in any alleged surplus assets. "A defined-benefit plan gives current and former employees property interests in their pension benefits but not in the assets held by the trust." *Id.* at 1189.[5]

Here again, the Ninth Circuit brought itself into manifest conflict with the Seventh Circuit, as well as with the Second and Third Circuits, each of which also has held that "[p]articipants in a defined benefit plan are not entitled to increases in benefits because successful investment causes assets to grow to be greater than liabilities." *Brillinger v. General Elec. Co.*, 130 F.3d 61, 64 (2d Cir. 1997); *Malia*, 23 F.3d at 831 n.2, 832-33. As these cases emphasize, the participants' "benefits" in a contributory defined-benefit plan do *not* include a portion of any plan assets above and beyond their defined benefits. *See, e.g., Brillinger*, 130 F.3d at 64; *Malia*, 23 F.3d at 831-33 (same). If this case had been filed in

[5] The Ninth Circuit attempted to distinguish *Georgia-Pacific* on the ground that "[t]here was *no* allegation in [that case] that the employer transferred assets from one plan to another or that the asset surplus was used to benefit employees who were not participants of the plan." App. 17a (emphasis in original). That asserted distinction, however, relates to the *content* of an employer's fiduciary duties, not to the antecedent question whether the employer has any such duties at all with respect to the challenged action. *See Spink*, 116 S. Ct. at 1788-89 ("The Court of Appeals erred by not asking whether fiduciary status existed in this case before it found a violation.").

the Second, Third, or Seventh Circuits, accordingly, it would readily have been dismissed.

By blurring the important distinction between defined-benefit and defined-contribution plans, the opinion below poses a grave threat to ERISA's fundamental goals of encouraging the adoption and financial stability of employee pension plans. *See, e.g.*, 29 U.S.C. §§ 1001, 1001b. For plan participants, persuading the courts to supplement a defined-*benefit* plan with a defined-*contribution* floor would offer the best of both worlds: they would be entitled to a share in any surplus if the plan's investments did well, but they would not have to worry about a reduction in benefits if the plan's investments did poorly. As the Seventh Circuit has explained, however, "[r]ational employers would respond to [such an asymmetric] structure by reducing the levels of benefits promised in plans (or by creating fewer plans). Neither effect would serve employees' long run interests; neither would be consistent with the purposes underlying ERISA." *Georgia-Pacific*, 19 F.3d at 1190. *See also Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 163 (7th Cir. 1988) (Posner, J.).[6]

[6] The Ninth Circuit's analysis is flawed in yet another respect: its uncritical acceptance of respondents' legally untenable allegation that the addition of the non-contributory benefit structure to the existing Hughes Plan created two distinct plans, even though all of the benefits continue to be paid from a single fund. *See* App. 10a-11a, 16a-17a, 23a. As a matter of law, the addition of a new benefit structure to an existing plan does not give rise to a new plan. *See, e.g.*, 26 C.F.R. § 1.414(l)-1(b)(1) ("A plan is a 'single plan' if . . . all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries. . . . A plan will not fail to be a single plan merely because . . . [it] has several distinct benefit structures which apply either to the same or different participants."); App. 30a-31a (Norris, J., dissenting) ("This argument is meritless. The 1991 amendment did not create a separate pension plan; it merely added an alternative benefit structure under the existing Plan."). Because this case involves only a single plan as a matter of law, there is no legal basis for the conclusion that the use of plan assets to fund a new benefit structure involves a withdrawal of assets from the plan. *See* App. 10a-12a, 23a.

III. The Ninth Circuit Erred by Rejecting the Unanimous Holdings of Other Circuits that Title IV of ERISA Provides the Exclusive Means of Terminating a Defined-Benefit Plan.

The Ninth Circuit also erred by authorizing respondents to proceed with their claim that the amendment creating the non-contributory benefit structure (effective January 1, 1991) amounted to a "termination" of the Plan that required immediate distribution of all Plan assets as of that date. Contrary to the Ninth Circuit's assertion (deleted from the opinion in response to Hughes' rehearing petition) that "ERISA does not define when a termination occurs," App. 11a n.3, the statute does define when the termination of a defined-benefit plan occurs. Indeed, those termination provisions occupy an entire title (Title IV) of the statute, *see* 29 U.S.C. §§ 1301-1461, and are administered by a distinct federal agency, the Pension Benefit Guaranty Corporation ("PBGC"), *see id.* § 1302.

Title IV of ERISA provides two — and only two — means for terminating a single-employer defined-benefit plan: (1) voluntary termination initiated by the employer, 29 U.S.C. § 1341; and (2) involuntary termination initiated by the PBGC, *id.* § 1342. The statute could scarcely be more explicit on this point:

> **§ 1341. Termination of single-employer plans**
>
> **(a) General rules governing single-employer plan terminations**
>
> **(1)** ***Exclusive means of plan termination***
>
> Except in the case of a termination for which proceedings are otherwise instituted by the [PBGC] as provided in section 1342 of this title, a single-employer plan may be terminated *only* in a standard termination under subsection (b) of this section or a

distress termination under subsection (c) of this section.

29 U.S.C. § 1341(a)(1) (emphasis added). The statute contains no provision authorizing plan participants (such as respondents) to initiate a termination or allowing courts to declare or order such a termination pursuant to common-law standards.

Because respondents could not and did not allege that the 1991 amendment involved the statutory termination mechanism, their claim that Hughes terminated the Plan on January 1, 1991, necessarily fails as a matter of law. Accordingly, as Judge Norris recognized, there is no legal basis for any further proceedings on that claim. *See* App. 34a-35a, 43a-44a.

In particular, there is no legal basis for the Ninth Circuit's holding that respondents are entitled to proceed with a nonstatutory theory of termination based on the common law of trusts. Although common-law principles may provide guidance for filling in ERISA's interstices, *cf. Varity Corp. v. Howe*, 116 S. Ct. 1065, 1070 (1996), they cannot override plain statutory text, *see, e.g., Mertens,* 508 U.S. at 259. Because ERISA expressly sets forth the "exclusive means of plan termination," courts lack authority to devise alternative means of plan termination. The Ninth Circuit's opinion, as amended in response to Hughes' rehearing petition, provides no justification for its recourse to the common law. *See* App. 11a n.3. The court simply deleted its original erroneous justification (that "ERISA does not define when a termination occurs") without receding from its endorsement of a nonstatutory theory of termination. *See id.*

It is hardly surprising that other circuits have squarely rejected similar attempts to circumvent ERISA's statutory termination mechanism. In *Phillips v. Bebber*, 914 F.2d 31 (4th Cir. 1990), the plaintiffs argued that two pension plans had been terminated pursuant to the underlying plan terms when the

employer ceased operations and terminated all its employees. *See id.* at 33-34. The *Phillips* plaintiffs sought the very relief respondents seek here: "a judicial determination that the plans had in fact been dissolved and that the participants were entitled to a distribution of the assets." *See id.* at 33. The Fourth Circuit readily rejected their claims. Whether there had been a termination within the meaning of the *plan*, the Court explained, was immaterial — there could have been no termination within the meaning of the *statute* absent "strict compliance" with the statutory termination provisions. *See id.* at 34. Because those provisions had not even been invoked, there could have been no termination as a matter of law. *See id.* at 34 & n.*. "[S]trict compliance with the statute is the sole means by which a pension plan subject to the provisions of ERISA may be terminated." *Id.* at 34.

Similarly, both the Third and Fifth Circuits have rejected the notion that pension plans can be terminated outside ERISA's exclusive statutory framework. Like the plaintiffs in *Phillips*, the plaintiff in *American Flint Glass Workers Union v. Beaumont Glass Co.*, 62 F.3d 574 (3d Cir. 1995), sought a judicially-ordered plan termination pursuant to the terms of the underlying plan. *See id.* at 578-79. The Third Circuit relied on *Phillips* in holding that the plan was "null and void" to the extent it purported to authorize termination outside ERISA's framework. *See id.* at 579-80. In *In re Esco Mfg. Co.*, 50 F.3d 315 (5th Cir. 1995), the Fifth Circuit held that a bankruptcy trustee lacked the power to order a plan termination outside the mechanism specified by ERISA, noting that "Congress intended [§ 1341] to 'provide the sole and exclusive means under which a qualified pension plan may be terminated.'" *Id.* at 316 (quoting H.R. Rep. No. 99-300, at 289 (1985)).[7]

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[7] Numerous other authorities — including the legislative history — agree that ERISA provides the exclusive means of plan termination. *See, e.g., Hall v. National Gypsum Co.*, 105 F.3d 225, 233 (5th Cir. 1997) ("ERISA contains detailed requirements that must be met before a Plan may be (continued...)

Needless to say, these cases cannot be squared with the Ninth Circuit's decision to allow respondents to pursue the theory that the Plan was terminated in 1991 by operation of the common law.

Indeed, at the rehearing stage below, the PBGC submitted an *amicus curiae* brief challenging the Ninth Circuit's conclusion that a defined-benefit plan could be terminated other than by the exclusive means set forth in Title IV of ERISA. The agency stated that the decision below "strikes at the heart of the Title IV termination insurance program," PBGC Br. 2, because "[a]bsent compliance with the process Congress adopted for the termination of a covered plan, PBGC's program simply would not be manageable," *id.* at 3. That interpretation of the statute is reflected in the PBGC's regulation (entitled to judicial deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)), that section 1341 is "the *exclusive* means of voluntarily terminating a plan." 29 C.F.R. § 4041.1 (emphasis added). The Ninth Circuit gave no explanation for its refusal to defer to the agency's position that there was no termination in this case as a matter of law.[8]

[7] (...continued)
terminated."); *PBGC v. Mize Co.*, 987 F.2d 1059, 1063 (4th Cir. 1993) ("The statutory provisions governing terminations of single-employer plans are exclusive."); *Chait v. Bernstein*, 835 F.2d 1017, 1020 (3d Cir. 1988) ("[W]e must look to ERISA itself to determine whether a termination has occurred"); H.R. Rep. No. 99-300, at 289 (1985) ("As under current law, the committee intends that ERISA provide the sole and exclusive means under which a qualified pension plan may be terminated.").

[8] The Ninth Circuit's opinion ignores the governing PBGC regulation, and instead cites a Treasury regulation, 26 C.F.R. § 1.401-6, that interprets a *pre-ERISA* provision of the Internal Revenue Code, *see id.* § 1.401-0(a). *See* App. 11a n.3. In response to Hughes' petition for rehearing, the Ninth Circuit majority deleted one reference to § 1.401-6, *see* App. 50a, 22a-23a, but continued to rely upon that obsolete regulation elsewhere in its opinion, *see id.* at 49a, 52a, 11a n.3.

If not reversed, the Ninth Circuit's termination holding would cause no end of mischief. It was hitherto unimaginable that a routine amendment to the benefit structure of a plan could possibly constitute a termination of the plan requiring the immediate distribution of the plan's assets. By holding that an amendment to a benefit feature can amount to a plan "termination," the decision below throws into chaos the routine operations of a wide array of benefit plans. Employers will be stymied in making sensible amendments to plans by the prospect of becoming caught up in protracted litigation over whether an amendment constitutes a "constructive termination" — litigation that, under the opinion below, cannot be resolved at the pleadings stage. Imposing such dire consequences on an employers' amendment of an employee-benefit plan runs contrary not only to ERISA's plain language, but also to Congress' intent to encourage such plans.

In short, if the Court does not summarily reverse the decision below, it should grant review of the Ninth Circuit's ruling that defined-benefit plans can be terminated by a nonstatutory means outside the exclusive means specified in ERISA.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of *certiorari*, and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STANLEY I. JACOBSON; Daniel P. Welsh;
Robert E. McMillin; Ernest O. Blandin;
Richard E. Hook,

Plaintiffs-Appellants,

v.

HUGHES AIRCRAFT COMPANY; Hughes
Non-Bargaining Retirement Plan,

Defendants-Appellees.

No. 93-55392
D.C. No. CV-92-04020-RG

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted Nov. 4, 1993 — Pasadena, California
Filed January 23, 1997

Before: Betty B. Fletcher, Harry Pregerson, and
William A. Norris, Circuit Judges.

Opinion by Judge Pregerson; Dissent by Judge Norris

OPINION

PREGERSON, Circuit Judge:

Plaintiffs appeal the district court's dismissal of their action brought under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et. seq. Plaintiffs are

retired Hughes Aircraft Company employees who are participants in the Hughes Non-Bargaining Retirement Plan (the "Contributory Plan"). Plaintiffs allege in their complaint that the employer, defendant Hughes Aircraft Company ("Hughes"), breached its statutory and fiduciary duties under ERISA when it used the Contributory Plan's surplus assets-attributable in part to employee contributions-to fund an early retirement program for existing employees and a *new* non-contributory pension plan for some employees that were not participants of the Contributory Plan. Plaintiffs seek a variety of remedies, including a distribution of "all or a portion of the excess Plan assets" in the form of increased benefits. The district court dismissed plaintiffs' complaint under Fed. R. Civ. P. 12(b)(6), without leave to amend. The simple question before us is whether plaintiffs have alleged sufficient facts in their complaint to state *any* claim for relief under ERISA. Assuming plaintiffs can prove what they have plead in their complaint, we conclude their claims are cognizable. We, therefore, reverse.

FACTS

According to the complaint,[1] defendant Hughes is an aerospace and electronics manufacturing company. Since 1951, Hughes has provided a retirement pension plan for its employees. At issue in this litigation is the use by Hughes of surplus assets from the Contributory Plan.

The terms of the Contributory Plan provide, in relevant part, that both Hughes and its employees *must* contribute to the Plan. The employees' contributions are automatically deducted from their pay. By 1986, as a result of both employer and employee contributions and as a result of investment growth, the Contributory Plan's assets exceeded the actuarial or present value of accrued benefits by almost one billion dollars.

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[1] All information in this section is taken from the complaint.

Apparently, because of this surplus, and after being acquired by the General Motors Corporation, Hughes, in 1987, ceased making contributions to the Contributory Plan.[2] The employees, in contrast, despite the overfunding, were required to continue making contributions to the Contributory Plan. As of January 1, 1992, approximately half the surplus in the Contributory Plan was attributable to employee contributions and the other half to employer contributions.

In 1989, Hughes amended the Plan and used part of the asset surplus to provide an early retirement program for existing employees. According to plaintiffs, by offering this program, Hughes was able to reduce its workforce and save payroll costs.

Plaintiffs also allege in their complaint that Hughes terminated the Contributory Plan on January 1, 1991, when Hughes created a new defined benefit plan (the "Non-Contributory Plan") and froze new enrollment in the Contributory Plan. The new Non-Contributory Plan covers all new employees as well as those old employees who chose not to remain in the Contributory Plan.

Although created through an "amendment" to the Contributory Plan, the Non-Contributory Plan shares virtually no characteristics with the older plan, other than administration by the same trustees. The Contributory Plan is elective and requires monthly contributions by the employees. The Contributory Plan also provides health coverage, a cost of living adjustment, and unreduced early retirement benefits.

In contrast, the Non-Contributory Plan requires no employee contributions, and new employees are enrolled automatically. The new plan does not provide health coverage, cost of living adjustment, or unreduced early retirement

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[2] According to plaintiffs, at the time General Motors acquired Hughes, the General Motors retirement plan was underfunded by over seven billion dollars. In fact, the Pension Benefit Guaranty Corporation listed the GM plan as one of the most underfunded pension plans in the country.

benefits. In addition, the new plan pays lower monthly retirement benefits than the Contributory Plan, and the two plans use different formulas to compute benefits.

According to plaintiffs' complaint, Hughes used and continues to use the asset surplus generated by employee and employer contributions from the Contributory Plan to fund the new Non-Contributory Plan. Plaintiffs further allege that in so doing, Hughes is improperly using plan assets attributable in part to employee contributions for its own benefit.

Plaintiffs filed this class action in the United States District Court for the District of Arizona. The putative class consists of over 10,000 persons who were participants in the Contributory Plan on December 31, 1991. The court granted Hughes's motion to transfer venue to the Central District of California. Defendants filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6). The district court granted the motion and dismissed plaintiffs' complaint without leave to amend. No discovery was ever taken in the district court.

ANALYSIS

A. Standard of Review

We review de novo a district court's dismissal of a complaint for failure to state a claim under Federal Rules of Civil Procedure 12(b)(6). *Everest and Jennings v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir.1994) (citations omitted). We apply the same standard on appeal as the district court. *Id.* "It is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove *no* set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see* 5 C. Wright & A. Miller, Federal Practice & Procedure §§ 1202, 1205-1207, 1215-1224, 1228 (1969)." *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 246 (1979) (*emphasis added*).

The Supreme Court has consistently adhered to this standard. Most recently, in *Hartford Fire Ins. Co. v. California*, ___ U.S. ___, 113 S. Ct. 2891, 2916-17 (1993), Justice Scalia, who concurred in the Court's decision, stated that, although he disagreed with Justice Souter's analysis as to what constitutes a boycott, he agreed that the action should not be dismissed because "other allegations in the complaints describe conduct that *may* amount to a boycott if the plaintiffs can prove certain additional facts." *Id.* (emphasis added). Justice Scalia further noted that allegations in a complaint are to be "[l]iberally construed" at the 12(b)(6) stage. *Id.* at 2917.

Thus, a court's role at the 12(b)(6) stage is not to decide winners and losers or evaluate the strength or weakness of claims. *See Everest and Jennings*, 23 F.3d at 228; *Abramson v. Brownstein*, 897 F.2d 389, 391 (9th Cir.1990). Nor can a court resolve factual questions at the 12(b)(6) stage. We must accept as true the allegations in the complaint and decide *only* whether plaintiff has advanced *potentially* viable claims.

With this standard in mind, we now examine plaintiffs' claims in this action.

B. Plaintiffs' ERISA Claims

At the heart of this dispute is whether Hughes is entitled to use and control for its *own* benefit the Contributory Plan's one billion dollar surplus, approximately half of which was generated by employee contributions. This is *not* a case in which the pension plan at issue was funded entirely by employer contributions. Nor is this a case in which the employer used the plan's asset surplus *solely* to benefit participants of the plan. Because plaintiffs allege that the employer used the Contributory Plan's asset surplus attributable in part to employee contributions for its own benefit and for the benefit of employees who were never participants in the Contributory Plan, we conclude that plaintiffs have stated cognizable claims under ERISA.

First Claim

Plaintiffs' first claim alleges that Hughes violated ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1), which provides that "the

assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants of the plan." The term "inure" has been defined as "mean[ing] broadly to 'become of advantage to the employer.'" *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1414 (2d Cir.1985)(citing *Teamsters Local 639 v. Cassidy Trucking, Inc.*, 646 F.2d 865, 868 (4th Cir.1981)), *cert. dismissed*, 474 U.S. 1113 (1986).

The district court rejected plaintiffs' anti-inurement claim. We agree with the district court that Hughes did not violate § 1103(c)(1) by the mere fact that Hughes ceased its contributions to the Contributory Plan. The terms of the Contributory Plan require Hughes to contribute to the Plan only when necessary to ensure sufficient funding. ERISA does not require an employer to contribute to an overfunded plan. *See Fechter v. HMW Indus., Inc.*, 879 F.2d 1111, 1113 (3rd Cir.1989).

This, however, does not mean that Hughes can use the Contributory Plan's asset surplus for its own benefit and for the benefit of employees who were never participants in the Contributory Plan. Hughes did not do anything so blatant as to distribute the surplus to itself and to the new employees. Instead, Hughes twice "amended" the Contributory Plan to its own advantage and used the asset surplus attributable in part to plaintiffs' contributions to offer an early retirement program and the *Non*-Contributory Plan for existing and new employees. By so doing, plaintiffs allege, Hughes reduced its labor costs while effectively increasing new employees' wages. Thus we find that, based on plaintiffs' allegations, Hughes has taken advantage of the plan's asset surplus for its own benefit.

Hughes, however, contends that its "amendments" creating two new benefits structures under the Contributory Plan did not violate ERISA's anti-inurement provision, because Hughes was not acting as a fiduciary when it "amended" the plan. To support its contention, Hughes relies on the Supreme Court's

recent decision in *Lockheed Corp. v. Spink*, ___ U.S. ___, 116 S.Ct. 1783 (1996).

In *Lockheed*, the Supreme Court held that amending an existing pension plan to use surplus assets to fund an early retirement program *for participants of the plan* does not violate ERISA, so long as other ERISA provisions are not violated. *Id.* at 1790 ("While other portions of ERISA govern plan amendments, *see, e.g.*, 29 U.S.C. § 1054(g) (amendment generally may not decrease accrued benefits); § 1085b (if adoption of an amendment results in underfunding of a defined benefit plan, the sponsor must post security for the amount of the deficiency), the act of amending a pension plan does not trigger ERISA's fiduciary provisions."). As the Supreme Court explained, generally "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries" under ERISA. *Id.* at 1789.

Lockheed, however, can be distinguished from this case. First, the Supreme Court in *Lockheed* did not address whether the early retirement program in that case violated ERISA's anti-inurement provision. Here, plaintiffs allege that Hughes improperly benefited from using plan assets. Second, the asset surplus that was used in *Lockheed* to fund the early retirement program was attributable *only* to employer contributions. Here, plaintiffs allege that the asset surplus Hughes used to fund the early retirement program and the new Non-Contributory Plan was attributable to *both* employer and employee contributions. Third, the early retirement program in *Lockheed* only benefited employees who were already participants in the existing pension plan. Here, some of the employees benefiting from the Non-Contributory Plan are new employees who were never participants in the Contributory Plan. Fourth, plaintiffs in *Lockheed* did not allege that the employer had terminated the pension plan. Here, plaintiffs allege that Hughes terminated the Contributory Plan when it froze new enrollment and created the Non-Contributory Plan. Lastly, the plaintiffs in *Lockheed* did not allege that the amendment resulted in the violation of

any other ERISA provisions. Here, plaintiffs allege that by using the asset surplus attributable in part to employee contributions Hughes reduced plaintiffs' accrued benefits and violated ERISA's vesting, nonforfeiture, and distribution requirements under 29 U.S.C. §§ 1053(a) and 1344.

Thus, *Lockheed* is of little help in determining whether Hughes's use of the Contributory Plan's asset surplus *attributable in part to employee contributions* violates ERISA. Even if we were to hold that under *Lockheed* Hughes's "amendments" in this case did not trigger its fiduciary obligations under ERISA, that does not mean that we must also hold that Hughes's conduct did not trigger ERISA's anti-inurement provision.

We have found no case which holds that the anti-inurement provision is only triggered when an employer is acting as a fiduciary. Nor can we reasonably interpret 29 U.S.C. § 1103(c)(1) as establishing such a requirement. Unlike other provisions under ERISA, *see, e.g.*, 29 U.S.C. § 1104 (specifically addressing fiduciary duties) and 29 U.S.C. § 1106 (specifically referring to a fiduciary), § 1103 makes no reference to fiduciaries or fiduciary obligations. Section 1103 refers only to employers, stating that "assets of a plan shall never inure to the benefit of any employer." 29 U.S.C. § 1103(c)(1). Thus, we hold that under a plan reading of § 1103, Hughes's alleged conduct in this case triggers ERISA's anti-inurement provision, whether or not the alleged conduct implicates ERISA's fiduciary obligations.

The dissent, however, asserts that the fact that an asset surplus is attributable in part to employee contributions is irrelevant. According to the dissent, an employer has sole discretion as settlor to use an asset surplus attributable in part to employee contributions. We disagree.

Under ERISA, Congress specifically provided protections for assets attributable to employee contributions. Congress enacted 29 U.S.C. § 1053, which establishes minimum vesting and nonforfeiture requirements for accrued benefits derived

from employee contributions. In addition, section 4404 requires that, upon a plan's termination, any residual assets attributable to employee contributions "shall be equitably distributed to the participants who made such contributions," after all liabilities have been satisfied. 29 U.S.C. § 1344(d)(3)(A).

It is clear from these provisions that Congress intended to distinguish between plan assets attributable solely to employer contributions from plan assets attributable in part to employee contributions. As the Fifth Circuit has explained:

> An entirely *employer* funded defined benefit plan pension trust is therefore more akin to a gratuitous trust so far as concerns surplus assets, *as to which ERISA so markedly distinguishes between those attributable to employer contributions* (thus suggesting that employer contributions are not a form of recontributed wages for such purposes). Where a gratuitous trust is fully performed without exhausting the trust estate, a resulting trust of the surplus is presumed to arise in favor of the settlor. RESTATEMENT (SECOND) OF TRUST § 430. This principle has been looked to in holding an employer entitled to surplus assets on termination of an *employer* funded defined benefit pension plan.

Borst v. Chevron Corp., 36 F.3d 1308, 1315 (5th Cir.1994) (emphasis added).

Thus, to ignore the distinction between a plan funded solely by employer contributions and a plan funded by both employer and employee contributions would eviscerate the protections provided to employees under ERISA with respect to their employee contributions. We, therefore, hold that, when both the employer and its employees contribute to a pension plan, the employer does not have sole discretion to use that part of a plan's asset surplus attributable to employee contributions.

Hughes, alternatively, argues, that even if plaintiffs are entitled to some portion of the asset surplus, the anti-inurement provision has not been triggered in this case because Hughes has not withdrawn or threatened to withdraw plan assets. Hughes relies on a Second Circuit decision, *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, in support of its position. *Amato* does not help Hughes. Like *Lockheed*, *Amato* involves an amendment to a *non*-contributory pension plan that reduced retirement benefits for a group of *participants* under an existing plan. As discussed above, this distinction is critical. While an employer may have the discretion to decide how to use an asset surplus attributable solely to *employer* contributions, so long as other provisions of ERISA are not violated, an employer does not have sole discretion to use a plan's asset surplus attributable in part to *employee* contributions to benefit itself and employees that were never participants in the plan. By its plain language, the anti-inurement provision requires that plan assets must "*never* inure to the benefit of any employer" and must be used "for the *exclusive* purposes of providing benefits *to participants* of the plan." 29 U.S.C. § 1103(c)(1) (emphasis added).

Further, to affirm the district court's dismissal on the ground that under *Amato* plan assets were never withdrawn in this case would require us to resolve disputed issues of fact. We would have to conclude that no termination has occurred and that only one plan exists. We, however, cannot resolve factual issues on a motion to dismiss.

In ruling on a 12(b)(6) motion, plaintiffs' allegations must be taken as true. Here, plaintiffs allege that by "amending" the Contributory Plan to freeze its enrollment and to create a separate Non-Contributory Plan for new employees, Hughes, in effect, terminated the Contributory Plan and "withdrew" the surplus assets for its own use and for the benefit of some employees who were never participants in the Contributory

Plan.[3] If in fact plaintiffs can prove that two separate plans exist and that Hughes's amendment terminated the Contributory Plan, Hughes's withdrawal of assets from the

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[3] Plaintiffs contend that Hughes's conduct here amounts to a constructive termination based on what one circuit has called the dry or wasting trust theory under the law of trusts. *See In re Gulf Pension*, 764 F.Supp. 1149, 1202 (S.D.Texas 1991), *aff'd sub nom*, *Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir.1994). The Supreme Court recently approved of courts looking to trust principles to construe ERISA provisions. *Varity Corp. v. Howe*, ___ U.S. ___, ___, 116 S.Ct. 1065, 1070, 134 L.Ed.2d 130 (1996). As the Supreme Court stated, "[ERISA's] fiduciary duties draw most of their content from the common law of trust, the law that governed most benefit plans before ERISA's enactment." *Id.* *See also In re Gulf*, 764 F.Supp. at 1202 ("[r]esort to the common law of trusts is . . . consistent with the underlying purpose of ERISA, which is rooted on the common law of trusts").

~~Because ERISA does not define when a termination occurs, we believe it is appropriate for a court to look to trust principles to determine when a termination occurs.~~ Under the common law of trusts, "[o]nce the object of the settlor had been achieved, the trust was deemed to end since its continuation would be useless and might frustrate the intent of the settlor [as] to a beneficiary or remainder interest." *In re Gulf*, 764 F.Supp. at 1202. See *also Wilson v. Bluefield Supply Co.*, 819 F.2d 457, 464 (4th Cir.1987) (holding that under the law of trusts any remaining assets after a trust's purpose has been fulfilled becomes "a 'resultant trust' for the benefit of the creator of the original trust . . . *by operation of law* unless he manifested a contrary intent").

We find plaintiffs allegations in this case-that Hughes's conduct in freezing enrollment in the Contributory Plan and creating the Non-Contributory Plan for existing and new employees converted the Contributory Plan into a wasting trust-to be sufficient to survive a 12(b)(6) motion. ~~The question of when a termination occurs is a mixed question of law and fact.~~ *See* 26 C.F.R. § 1.401-6(b)(1) ("whether a plan is terminated is generally a question to be determined with regard to all the facts and circumstances in a particular case").

To resolve this question, the record in this case must be further developed. Only after discovery can the district court properly determine whether the Contributory Plan's purposes have been accomplished and whether its liabilities are fixed enough to terminate the plan. *See In re Gulf*, 764 F.Supp. at 1202-1203. Such a determination may require the help of experts.

Contributory Plan to create and fund the new Non-Contributory Plan for the benefit of some employees who were never participants in the Contributory Plan violated ERISA's anti-inurement provision.[4]

Hughes, however, contends that any benefit it receives from using the surplus assets of the Contributory Plan is an "incidental side effect," insufficient as a matter of law to state a claim under the anti-inurement provision. *Holliday v. Xerox Corp.*, 732 F.2d 548, 551 (6th Cir.1984), *cert. denied*, 469 U.S. 917 (1984). We reject this contention.

Whether Hughes gains an "incidental" economic benefit from being able to buy out its older employees through an early retirement program and by being able to offer new employees a pension plan that requires no employee contributions is a question of fact we cannot resolve on a 12(b)(6) motion. To resolve this factual question, we would have to look beyond the

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4 Even if we were to conclude as a matter of law that no termination has occurred here, we find that plaintiffs could still amend their complaint to allege a different theory of recovery. As the Seventh Circuit recently noted in a case involving an employer's decision to amend a pension plan to use surplus assets to increase the benefits of current employee participants without increasing the pension benefits of retired participants:

> A transaction of this kind would reduce the expected value of the benefits. Writing additional promises without increasing the assets available to fund those promises increases the risk that at some time in the future-if, perhaps the economy takes a downturn and . . . [the employer] is unable to top up the plan-the trust will be unable to satisfy all of its obligations . . . . [thus] increas[ing] the risk of non-payment.

Johnson v. Georgia-Pacific Corp., 19 F.3d 1184, 1187 (7th Cir.1994). The Supreme Court in *Lockheed* also recognized that "commercial bargains that present a special risk of plan underfunding" are the kind of transactions that ERISA was intended to prohibit. 116 S. Ct. at 1971.

In this case, it could very well be that by depleting the Contributory Plan's asset surplus Hughes increased the risk of the Contributory Plan's underfunding. Only through discovery, however, will plaintiffs know whether the expected value of their benefits has been reduced.

allegations in the complaint. This, we cannot do. We reiterate that on a 12(b)(6) motion we must take as true each allegation in plaintiffs' complaint and draw all reasonable inferences in favor of plaintiffs.

Based on the liberal 12(b)(6) standard, we believe that plaintiffs' allegations are sufficient to state a claim under ERISA's anti-inurement provision. Hughes, in effect, remained competitive in the labor market by using the asset surplus, created in part by employee contributions, to reduce its labor costs and to increase new employees' wages. Had Hughes not used the Contributory Plan's surplus, Hughes would have had to use its own revenues or offered fewer benefits to its new employees. We cannot say at the 12(b)(6) stage that Hughes's alleged benefit is an "incidental side effect" that does not violate ERISA's anti-inurement provision.

Second Claim

Plaintiffs' second claim alleges that Hughes breached its fiduciary duties under ERISA § 404, 29 U.S.C. § 1104, by using the Contributory Plan's surplus assets to fund the Non-Contributory Plan for some employees that never were participants in the Contributory Plan. Section 1104 requires that a fiduciary "discharge his duties with respect to a plan *solely* in the interest of the participants and beneficiaries and (A) for the *exclusive* purpose of: (i) providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(A)(1) (emphasis added). The complaint, by alleging that Hughes is using funds attributable to their employee contributions to fund a new plan for some employees who were never participants in the Contributory Plan, states a valid claim for relief.

Hughes, however, contends that its conduct did not violate ERISA's § 1104. Hughes maintains that it was not acting as a fiduciary when it "amended" the Contributory Plan to use the asset surplus. According to Hughes, an employer, as settlor, can change a plan's structure at any time, for whatever reason, and for anyone's benefit without implicating its fiduciary duties under ERISA.

The district court agreed. The district court concluded that Hughes's decision to amend the Contributory Plan to provide for asset surplus reversion to itself was a plan design decision that did not implicate ERISA's fiduciary obligations, regardless of the fact that the asset surplus was attributable in part to employee contributions and used to benefit some employees who were never participants in the Contributory Plan. The district court was wrong.

As discussed above, based on our reading of the relevant ERISA provisions, we hold that, when an employer is not the sole contributor of a pension plan, the employer does not have sole discretion to use the asset surplus of the plan. If employees contribute to the plan, the employer has a fiduciary duty to the employees when it amends the plan to use an asset surplus. In essence, when a plan is funded by both employer and employee contributions, both the employer and the employees are *co*-settlors of the plan.

The recent Supreme Court decisions construing ERISA's fiduciary provisions do not dictate otherwise. *See Lockheed Corp. v. Spink*, 116 S. Ct. 1783; *Varity Corp. v. Howe*, 116 S.Ct. 1065. It is true that in *Lockheed*, the Supreme Court held that an amendment to a plan to provide an early retirement program for existing employees did not trigger ERISA's fiduciary obligations because "[w]hen employers undertake those actions, . . . they do not act as fiduciaries, . . . but are analogous to the settlors of a trust." 116 S.Ct. at 1789. But as discussed above, the employer in *Lockheed* was the *sole* contributor of the plan and used the plan's surplus *only* to benefit the plan's participants. Here, plaintiffs allege that Hughes used the Contributory Plan's surplus assets attributable in part to employee contributions for Hughes's own benefit and for the benefit of some employees who were never participants in the Plan.

Thus, we cannot say that Hughes was simply acting like a settlor of a trust when it "amended" the plan to fund the Non-Contributory Plan for existing and new employees. We

hold that, when an employer amends a plan to use for its own benefit an asset surplus attributable in part to employee contributions, the employer is wearing both its "fiduciary" and its "employer" hats. *See Varity*, 116 S.Ct. at 1073 ("reasonable employees, in the circumstances found by the District Court, could have thought that Varity was communicating with them *both* in its capacity as employer *and* in its capacity as plan administrator").

In *Varity*, the Supreme Court construed 29 U.S.C. § 1002(21)(A), which provides that a person acts as "a fiduciary with respect to a plan to the extent . . . he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or he has any discretionary authority or discretionary responsibility in the administration of such plan." The Supreme Court held that this definition "limit[s] the scope of fiduciary activity to discretionary acts of plan 'management' and 'administration.'" 116 S.Ct. at 1072-1073.

The Supreme Court also looked to trust law to construe the meaning of "fiduciary" and trust "administration." As the Supreme Court observed:

> The ordinary trust law understanding of fiduciary "administration" of a trust is that to act as an administrator is to perform the duties imposed, or exercise the powers conferred, by the trust documents. . . . The law of trusts also understands a trust document to implicitly confer "such powers as are necessary or appropriate for the carrying out of the purposes" of the trust.

Id. at 1073. Further, the Supreme Court stated:

> There is more to plan (or trust) administration than simply complying with the specific duties imposed by the plan documents or statutory regime; it also includes the activities that are "ordinary and natural means" of

> achieving the "objective" of the plan. . . . Indeed, the primary function of the fiduciary duty is to constrain the exercise of *discretionary* powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime. If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose.

Id. at 1073-1074.

Under *Varity*, therefore, the question we must answer is whether Hughes was carrying out discretionary functions relating to plan management and administration when it "amended" the plan to use surplus assets attributable in part to employee contributions.

We answer this question affirmatively, and conclude that, based on the allegations in plaintiffs' complaint, Hughes was acting as a fiduciary when it "amended" the plan. There is no question that Hughes's amendment triggered ERISA's statutory duties with respect to assets attributable to employee contributions. In addition, because Hughes was disposing of the plan's assets when it amended the plan, Hughes's amendment necessarily affected the management and administration of the plan. Further, the use of surplus assets from one plan to fund another plan that benefits new employees who were never participants in the first plan may increase the risk of underfunding and non-payment.

Hughes, however, contends that there can be no violation of the exclusive benefit rule under 29 U.S.C. § 1104 because only one plan and one group of employees exist in this case. To adopt Hughes's contention at the pleading stage, we would have to disregard plaintiffs' allegations in the complaint that two separate pension plans exist and that the new employees benefiting from the Contributory Plan's asset surplus never were participants in the Contributory Plan. Because we must take as true all of the allegations plaintiffs make in their

complaint, we find that plaintiffs' allegations are sufficient to overcome a dismissal under 12(b)(6).

A Seventh Circuit case, *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir.1994), does not persuade us otherwise. In *Johnson*, the employer, GNN, amended the company pension plan to provide increased benefits to active workers and thereby deter a hostile takeover. After GNN was acquired, the surplus from the pension plan was distributed in the form of increased wages to the active employees. The retired workers brought suit, alleging that GNN breached its fiduciary duties under ERISA by not also increasing their benefits. The Seventh Circuit found that the district court properly dismissed the retirees' claims.

The instant case presents a fundamentally different scenario. Like the employer in *Lockheed*, the employer in *Johnson* chose to give an extra benefit to one group of employees within a larger group, all of whom were participants in the same plan. *Id.* at 1186-1187. There was *no* allegation in *Johnson* that the employer transferred assets from one plan to another or that the asset surplus was used to benefit employees who were not participants of the plan. *Id.* at 1189. The Seventh Circuit found that, even though it favored one group of employees over others, GNN was still exercising its duties in the sole interest of the plan participants. *Id.* at 1187.

Here, we cannot say that when Hughes "amended" the plan to use the asset surplus it was "managing" or "disposing of" plan assets for the *sole* benefit of participants in one plan. *Id.* at 1189. Plaintiffs allege in their complaint that the Contributory Plan was terminated and that the new Non-Contributory Plan benefited some employees who were never participants in the Contributory Plan. Based on these allegations, we find that when Hughes used the Contributory Plan surplus to create and fund the Non-Contributory Plan, Hughes was managing and disposing of plan assets within the meaning of ERISA. Assuming that plaintiffs can prove their allegations, we conclude that Hughes's conduct implicated its

fiduciary duties under ERISA. Plaintiffs, therefore, have stated a claim for relief under § 1104 of ERISA.

Third Claim

Plaintiffs' third claim alleges that Hughes violated ERISA § 203, 29 U.S.C. § 1053(a), by using vested, nonforfeitable benefits to meet Hughes's obligations to fund the Contributory and Non-Contributory Plans. Plaintiffs allege that, by depleting the surplus to fund the Non-Contributory Plan, Hughes, in effect, forfeited plaintiffs' accrued benefits derived from employee contributions. Plaintiffs contend that under ERISA employees are entitled to accrued benefits traceable to their own contributions, even if the amount of such benefits exceeds the defined benefits under the plan. We agree that, if employees' own contributions and the income their contributions generate exceed the defined benefit amount under the plan, ERISA requires that employees be paid the larger amount.

Section 1053 establishes minimum vesting and nonforfeiture requirements for all pension plans, providing, in relevant part:

> Each pension plan shall provide that an employee's right to his normal retirement benefit is *nonforfeitable* upon the attainment of normal retirement age *and in addition* shall satisfy the requirements of paragraphs (1) and (2) of this subsection.
>
> > (1) A plan satisfies the requirements of this paragraph *if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.*
> >
> > . . . .

29 U.S.C. § 1053(a)(1). Paragraph (2) establishes the vesting requirements for an employee's accrued benefit derived from employer contributions. The vesting requirements for employer contributions are not at issue in this case.

To determine the amount of accrued benefits under paragraph (1), we look to § 1054(c)(2)(B), which defines the "accrued benefit derived from contributions made by an employee" as the employee's "accumulated contributions expressed as an annual benefit commencing at normal retirement age." Section 1054(c)(2)(C), in turn, defines "accumulated contributions" to include the employee's mandatory contributions *plus* appropriate interest. Further, 29 U.S.C. § 1002(23) provides that "[t]he accrued benefit of an employee *shall not be less* than the amount determined under section 1054(c)(2)(B) of this title with respect to the employee's accumulated contribution." (Emphasis added.)

A plain reading of these ERISA provisions makes clear that plaintiffs are entitled to more than the amount of defined benefits under the plan if that amount *is less* than the accrued benefits derived from their mandatory employee contributions. In other words, § 1053 establishes a floor with respect to mandatory employee contributions: the amount of accrued benefits cannot fall below the amount of accrued benefits derived from employee contributions. If it does, the employer violates the minimum vesting and forfeiture requirements of 29 U.S.C. § 1053.

As the Supreme Court has stated, "the concepts of vested rights and nonforfeitable rights are critical to the ERISA scheme." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1980). "One of the primary purposes of the Act is to insure that plan participants do not lose vested benefits because of 'unduly restrictive' forfeiture[s]." *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 449 (9th Cir.1980).

Thus, by establishing minimum vesting and pay-out requirements for *all* pension plans under section 1053, Congress gave employees *nonforfeitable* rights to their vested benefits. A "nonforfeitable" right is defined under ERISA as " 'a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is

unconditional, and which is *legally enforceable* against the plan.'" 29 U.S.C. § 1002(19) (emphasis added). In construing this definition, the Supreme Court has stated that "[i]t is therefore surely consistent with the statutory definition of 'nonforfeitable' to view it as describing the quality of the participant's right to a pension *rather* than a limit on the amount he may collect." *Alessi*, 451 U.S. at 512 (quotations and citations omitted) (emphasis added).

Hughes maintains that the forfeiture requirements apply only upon termination, which, according to Hughes, has not occurred here. Hughes, however, cites no cases to support its assertion that the forfeiture requirements are triggered only upon termination. Nor is such an interpretation supported by the language of 29 U.S.C. § 1053. This section does not mention termination, nor does it reference 29 U.S.C. § 1344(d)(2), which requires the equitable distribution of residual plan assets attributable to employee contributions upon the termination of a plan.

Hughes further argues that in a defined benefit plan accrued benefits attributable to employee contributions can be forfeited where a surplus exists. In support of its position, Hughes quotes a passage from *Hummell*, which states that "nothing in ERISA prohibits 'a plan's providing for forfeiture of benefits when the affected benefits are in excess of the minimum vesting requirements of 29 U.S.C. § 1053.'" 634 F.2d at 450.

This passage does not help Hughes. In *Hummell*, the accrued benefits at issue were attributable *only* to *employer* contributions. We held that the forfeiture in *Hummell* did not violate ERISA's minimum vesting requirements because the accrued benefits all from employer contributions *exceeded* the minimum vesting requirements under 29 U.S.C. § 1053(a).[5]

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[5] *See also Lojek v. Thomas*, 716 F.2d 675, 679 (9th Cir.1983) (holding that where employer complies with minimum vesting requirements, "ERISA does not prohibit forfeiture of non-vested benefits in excess of the minimum vesting requirements"); *Fentron Industries v. National Shopmen Pension Fund*, 674 F.2d 1300, 1306 (9th Cir.1982) (holding that "pension plan may cancel benefits not required by ERISA's minimum vesting requirements").

Therefore, *Hummell's* holding, which allows an employer to forfeit benefits in excess of the minimum vesting requirements when *all* the benefits derive from employer contributions, cannot be extended to situations where, as here, a portion of the surplus assets are attributable to employee contributions. By statutory definition, employees are vested in their own contributions and the income generated therefrom.

As discussed above, plaintiffs in this case allege that Hughes is using accrued benefits that are protected by ERISA's minimum vesting and nonforfeiture requirements. Because such benefits are attributable to employee contributions and thus nonforfeitable under 29 U.S.C. § 1053(a), Hughes's alleged forfeiture may violate ERISA.[6] Even if we were to concede for purposes of argument that section 1053 is triggered only upon termination,[7] we must still reverse the district court because the complaint alleges that a termination has occurred. Plaintiffs, therefore, have stated a claim for relief under 29 U.S.C. § 1053.[8]

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[6] Whether plaintiffs in this case are actually entitled to more than the defined benefit amount under the plan requires calculations that raise issues of fact which we cannot decide at the pleading stage.

[7] Termination would not be the only triggering event. Fiduciary obligations of Hughes as trustee would preclude actions short of termination that would threaten compliance with 29 U.S.C. § 1002(23), which requires that an employee's accrued benefit "shall not be less than the amount determined under 1054(c)(2)(B) . . . with respect to the employee's accumulated contributions" derived from employee contributions.

[8] Nothing the Supreme Court said in *Lockheed* and *Varity* affects our analysis of plaintiffs' claim under 29 U.S.C. § 1053. Neither *Lockheed* nor *Varity* construed ERISA minimum vesting and forfeiture requirements. In fact, the Supreme Court in *Lockheed* specifically noted that "there is no claim in this case that the amendments resulted in any violation of the participation, funding, or vesting requirements of ERISA." 116 S. Ct. at 1790 n. 5.

Fourth Claim

Plaintiffs' fourth claim alleges that Hughes violated ERISA § 4404, 29 U.S.C. § 1344, which addresses the allocation of assets when an employer terminates a plan. Section 1344(d)(3)(A) requires that any residual assets attributable to employee contributions that remain after all liabilities have been satisfied "shall be equitably distributed to the participants who made such contributions." *Id.* Further, § 4404(d)(1) provides that an employer may cause reversion of excess assets to itself only if "(A) all liabilities of the plan to the participants and their beneficiaries have been satisfied, (B) the distribution does not contravene any provision of law and (C) the plan provides for such a distribution." *Id.*

The complaint alleges that Hughes terminated the Contributory Plan when it froze enrollment in the Contributory Plan and created the Non-Contributory Plan for new employees without equitably distributing the surplus attributable to the employee contributions. The complaint further alleges that the Contributory Plan does not contain a provision for reversion of excess assets upon termination. Based on these allegations, we find that plaintiffs stated a claim under § 1344.

~~In determining whether a plan has been terminated, courts must look to "all the facts and circumstances in a particular case." 26 C.F.R. § 1.401-6(b)(1). *See also Borst*, 36 F.3d at 1313 n. 9. Under the applicable regulations, the Department of the Treasury has construed termination to "include[ ] both a partial termination and a complete termination of a plan." *Id.* at § 1.401-6(b)(2). Examples of when a termination may occur include: (1) an employer beginning to discharge employees in connection with winding down a business; (2) an employer replacing a plan with a non-comparable plan; (3) an employer amending the plan to exclude a group of employees who were formerly covered by the plan; (4) an employer changing the eligibility and vesting requirements under the plan; or (5) an employer reducing or eliminating its contributions to the plan. *Id.* at § 1.401-6(b). *See also In re Gulf*, 764 F.Supp. at 1202~~

~~(finding constructive termination by applying wasting trust principles to ERISA context).~~

Assuming that plaintiffs can prove that Hughes terminated the Contributory Plan, ERISA would require Hughes to equitably distribute to employees the surplus assets attributable to employee contributions. *See, e.g.*, *Bridgestone/ Firestone v. Pension Benefit Guaranty Corp., et al.*, 892 F.2d 105 (D.C. Cir. 1990) (holding that employer required to return surplus attributable to employee contributions under § 1344 upon termination of defined benefit plan). Thus, we conclude that plaintiffs have stated a claim under § 1344.

Fifth Claim

Plaintiffs' fifth claim alleges that the defendants breached their fiduciary duties under 29 U.S.C. § 1106(a)(1)(D), which prohibits the "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." The complaint alleges that the Contributory Plan and the Non-Contributory Plan are two different plans, and that transferring funds from one to the other is prohibited by ERISA.

The district court dismissed the fifth claim by finding that only one plan exists in this case. As discussed above, the district court erred in making this finding because it contradicts plaintiffs' allegations in the complaint. As we stated above, courts are not supposed to resolve questions of fact on a 12(b)(6) motion. Even assuming that only one plan exists, we still find that plaintiffs' allegations are sufficient to state a claim under § 1106(a)(1)(D). *See Cutaiar v. Marshall*, 590 F.2d 523, 529 (3rd Cir.1979) ("[w]hen identical trustees of two employee benefit plans whose participants and beneficiaries are not identical effect a loan between the plans without a[n] . . . exemption, a per se violation of ERISA exists").

As we discussed above, Hughes was acting as a fiduciary when it "amended" the Contributory Plan to use surplus assets attributable to plaintiffs' employee contributions. As a fiduciary, Hughes was prohibited under § 1106(a)(1)(D) from

using the asset surplus attributable to employee contributions for its own benefit and for the benefit of new employees who were never participants in the plan.

Although the Supreme Court held in *Lockheed*, that "payment of benefits to plan participants and beneficiaries pursuant to terms of an otherwise *lawful* plan is wholly outside the scope of" § 1106(a)(1)(D), the Supreme Court also recognized that "commercial bargains that present special risk of plan underfunding" or that "involve uses of plan assets that are potentially harmful to the plan" are the kind of transactions prohibited under § 1106(a)(1)(D). 116 S.Ct. at 1790-1791. Indeed, the Supreme Court in *Lockheed* qualified its holding that requiring employees to release all employment- related claims against the employer in exchange for benefits under an early retirement program did not violate ERISA's fiduciary obligations by noting that there was no claim in *Lockheed* that the employer's "amendments resulted in any violation of the participation, funding or vesting requirements of ERISA." *Id.* at 1790 n. 5. Thus, the Supreme Court in *Lockheed* suggested that, where there is an allegation that payment of benefits is "a sham transaction, meant to disguise an otherwise unlawful transfer of assets to a party in interest, or involved a kickback scheme," such allegation is sufficient to state a claim under § 1106(a)(1)(D). *Id.* at 1792 n. 8.

Reading the complaint as a whole and drawing all reasonable inferences in favor of plaintiffs, we find that plaintiffs' allegations also support a claim for relief under the "sham transaction" theory recognized in *Lockheed*. In essence, plaintiffs allege that Hughes's "amendment" of the Contributory Plan was a sham transaction used to accomplish the unlawful transfer of the Contributory Plan's asset surplus attributable to employee contributions. The alleged transfer may be unlawful because, under the anti-inurement and nonforfeiture provisions, Hughes was prohibited from using the asset surplus attributable in part to employee contributions for its own benefit and the benefit of new employees who were

never participants in the Contributory Plan. Assuming that plaintiffs can prove that Hughes's "amendment" resulted in an unlawful use of plan assets, we find that Hughes's alleged conduct constitutes a prohibited transaction under 29 U.S.C. § 1106(a)(1)(D).

Sixth Claim

Plaintiffs' sixth claim alleges that the defendants violated ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), which provides that the plan fiduciaries must carry out their duties "in accordance with the documents and instruments governing the plan." According to plaintiffs, Hughes used Contributory Plan assets to provide eligible employees with an early retirement program. Plaintiffs contend that the early retirement program offered benefits in a discriminatory manner to only a select group of participants in violation of Article V, § 5.2 of the Plan. This section provides that the "Plan shall be administered, interpreted and applied fairly and equitably and in accordance with the specified purpose of the Plan."

Although the Supreme Court in *Lockheed* held that using surplus assets attributable solely to employer contributions to fund an early retirement program does not violate ERISA, this holding does not mean that the use of plan assets *attributable to employee contributions* to fund an early retirement program also does not violate ERISA. As discussed above, we do not think that an employer can unilaterally decide to use plan assets attributable to employee contributions without implicating ERISA's fiduciary obligations. Whether Hughes's conduct in this case actually violated the provisions of the plan raises questions of fact which we cannot resolve on a 12(b)(6) motion. Thus, we find that plaintiffs have stated a claim under 29 U.S.C. § 1104.

C. Procedural Errors

Plaintiffs additionally argue that the Arizona district court abused its discretion by transferring the action to the Central District of California. We review a district court's decision to transfer an action pursuant to 28 U.S.C. § 1404(a) for an abuse of discretion. *See Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir.1987), *cert. denied*, 485 U.S. 993 (1988).

Plaintiffs correctly note that a plaintiff's choice of forum is accorded great deference in ERISA cases. *See Dugan v. M & W Trucking, Inc.*, 727 F. Supp. 417, 419 (N.D. Ill. 1989). However, this deference is one of several factors a court must consider when ruling on a motion to transfer venue. Under *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir.1986), the district court must consider: (1) the relative convenience of the selected forum and the proposed forum; (2) the possible hardship to the plaintiff if the court grants the motion; (3) the interests of justice; and (4) the deference to be accorded the plaintiffs' choice of forum. In applying these factors to the instant case, we cannot say that the Arizona district court abused its discretion in concluding that a transfer of venue was proper.

Finally, plaintiffs argue that after the case was transferred to California, it was wrongly reassigned to Judge Gadbois. The case was initially assigned to Judge Consuelo Marshall, but was transferred to Judge Gadbois because it allegedly presented issues similar to those in another case previously heard by him. Plaintiffs contend that the instant case did not qualify as a "related case" transfer. While it may be that the instant case has little in common with the prior case, we are required to accord broad deference to a court's interpretation of its local rules. *See United States v. Mouzin*, 785 F.2d 682, 695 (9th Cir.1986), *cert. denied sub nom., Carvajal v. United States*, 479 U.S. 985 (1986). The district court did not abuse its discretion in transferring this case from Judge Marshall to Judge Gadbois.

CONCLUSION

The district court erred in dismissing plaintiffs' complaint under rule 12(b)(6). Neither the district court nor the dissent applied the 12(b)(6) standard correctly. At the pleading stage before discovery, all allegations must be liberally construed and taken as true, and all inferences must be drawn in favor of the plaintiff. Applying this standard, we conclude that this complaint alleges cognizable causes of action under ERISA. We, therefore, reverse and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

NORRIS, Circuit Judge, dissenting:

Plaintiffs-appellants are five retired Hughes Aircraft Company employees who are receiving retirement benefits under the Hughes Non-Bargaining Retirement Plan (the "Plan" or "Hughes Plan").[1] The five plaintiffs are among the 10,000-plus Hughes employees and retirees participating in the Plan. The principal relief plaintiffs seek is a termination of the Hughes Plan and a distribution of its assets to participants, such as the plaintiffs, who have made contributions to the Plan.

Plaintiffs allege that, largely as a result of "investment growth," Plan assets grew to the point that they exceeded the actuarially projected value of Plan liabilities by approximately $1 billion. In the event that plaintiffs succeed in their quest for a judgment terminating the Plan, ERISA provides for an equitable distribution of the Plan assets to those participants who have contributed to the Plan. Thus, if the Plan is terminated, plaintiffs will receive not only the defined pension benefits which they are currently receiving, but also a share of the $1 billion surplus. That is the pot of gold at the end of the rainbow that drives this litigation.

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1 The plaintiffs seek to represent a class "consisting of all participants of the Plan who are or may become eligible to receive retirement benefits under the Plan." Compl. ¶ 10.

First Claim: Anti-Inurement

In their first claim for relief, plaintiffs contend that Hughes violated ERISA's so-called anti-inurement provision, ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1),[2]

> by utilizing excess Plan assets attributable to employer and employee contributions for the sole and exclusive benefit of the employer and to the detriment of plaintiffs and the class they represent.

Compl. ¶ 32. The plaintiffs' anti-inurement claim is based on two independent theories. First, they allege that when the Plan accumulated "excess assets," Hughes stopped making contributions to the Plan. As a result, plaintiffs contend, Hughes used Plan assets for its own benefit in violation of § 403(c)(1).

This claim is meritless.[3] As the district court correctly noted, the Plan itself imposes an obligation on Hughes to contribute *only* when necessary to ensure that the Plan is actuarially sound, i.e., sufficiently funded to meet projected liabilities. Judgment, filed Feb. 9, 1993, at ¶ 5(c). Section 3.1 of the Plan provides that:

> The cost of Benefits under the Plan, to the extent not provided by contributions of Participants . . . shall be provided by contributions of [Hughes] not less than in such amounts, and at such times, as the Plan Enrolled Actuary shall certify to be necessary, to fund Benefits

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[2] ERISA § 403(c)(1) provides in relevant part:

> [T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

29 U.S.C. § 1103(c)(1).

[3] The majority agrees. However, of all the plaintiffs' varied claims regarding the $1 billion surplus, this is the only one that the majority finds meritless.

> under the Plan in accordance with the actuarial assumptions selected by such Actuary from time to time. . . .

In addition, section 6.2 of the Plan allows Hughes to "suspend" contributions unless it would thereby cause an "accumulated funding deficiency."[4]

ERISA does not require an employer to continue making contributions to an adequately funded plan. In *Fechter v. HMW Indus., Inc.*, 879 F.2d 1111 (3d Cir. 1989), the court noted that, although employees were required to continue making contributions,

> [e]mployer contributions were made only when necessary to keep the Fund actuarially sound, *i.e.*, sufficiently funded. Because the Plan was overfunded, [the employer] did not have to make any contributions for the last five plan years.

Id. at 1113; *see also LLC Corp. v. Pension Benefit Guar. Corp.*, 703 F.2d 301, 302 (8th Cir.1983) (noting that terms of pension plan required employee participants to contribute six percent of salary, but required employer to contribute only as much as necessary to fund actuarially determined benefits). The logic underlying this rule was explained in *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1190 (7th Cir.1994):

> Pension law covers bad times as well as good times. In bad times (when declines in the value of assets make plans underfunded) employers must contribute more.

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[4] "Accumulated funding deficiency" is defined in ERISA as

> the excess of the total charges to the funding standard account for all plan years (beginning with the first plan year to which [ERISA] applies) over the total credits to such account for such years or, if less, the excess of the total charges to the alternative minimum funding standard account for such plan years over the total credits to such account for such years.

ERISA § 302(a)(2), 29 U.S.C. § 1082(a)(2).

If in good times employers were required to distribute the surplus to retirees on the theory that they "owned" that value, outcomes would be asymmetric. Employers would be liable for shortfalls but could reap no benefit from surpluses.

The plaintiffs' second anti-inurement theory is that Hughes violated § 403(c)(1) when it amended the Plan in 1991 to add a non-contributory benefit structure. Before this amendment, the Plan operated exclusively through a contributory benefit structure. In other words, under the pre-1991 Plan, all participants were required to make contributions to the Plan fund. Under the non-contributory benefit structure added by the 1991 amendment, participants would not be required to make contributions to the fund but they would receive lesser pension benefits than under the contributory structure. Under the 1991 amendment, existing employees were free to choose between the two benefit structures. Thus, the choice given existing employees was between (1) making contributions and receiving the higher level of defined benefits available under the contributory benefit structure; or (2) making no contributions and receiving lesser benefits under the non-contributory structure. New employees who enrolled in the Plan after the effective date of the 1991 amendment were required to enroll in the non-contributory benefit structure. The 1991 amendment had no effect on the rights of Plan participants, such as the plaintiffs, who had already retired and were already receiving their pensions as defined by the Plan. At all times, Plan benefits were paid out of a single fund, and Hughes' obligation to assure that the Plan was adequately funded remained constant after the 1991 amendment.

Nonetheless, plaintiffs argue that Hughes acted for its own benefit by using assets from the "contributory plan" to discharge its obligation to fund benefits under the "non-contributory plan." This argument is meritless. The 1991 amendment did not create a separate pension plan; it merely

added an alternative benefit structure under the existing Plan.[5] In amending the Plan to add the non-contributory benefit structure, Hughes acted in its capacity as a settlor, not as a fiduciary. It is well-settled that an employer's decision to amend a pension plan is an exercise of plan design, which does not implicate the employer's fiduciary duties. This principle was recently confirmed in *Lockheed Corp. v. Spink*, 116 S.Ct. 1783, 1789 (1996) ("When employers [adopt, modify, or terminate a pension plan], they do not act as fiduciaries, but are analogous to the settlors of a trust.") (citations omitted); *see also Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir.1995) ("Virtually every circuit has agreed that . . . an employer may decide to amend an employee benefit plan without being subject to fiduciary review."); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir.1990) ("[A]n employer's decision to amend or terminate an employee benefit plan is unconstrained by the fiduciary duties that ERISA imposes on plan administration."); *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1432 (9th Cir.1986) (employer's decision to terminate pension plan was a business decision that did not implicate fiduciary duties under ERISA). As a plan settlor, Hughes "decide[s] who receives pension benefits and in what amounts, select[s] levels of funding, adjust[s] myriad other details of pension plans, and may decide to terminate the plan altogether." *Johnson*, 19 F.3d at 1188. Having these powers, Hughes also has the lesser included power to add a new benefit structure to an existing plan. Cf. *Hickerson v. Velsicol Chem. Corp.*, 778 F.2d 365 (7th Cir.1985), *cert. denied*, 479 U.S. 815 (1986) (holding that conversion from defined contribution, profit-sharing plan to defined-benefit plan did not violate ERISA); Treas. Reg. § 1.414(l)-1(b)(1)(i), 26 C.F.R. § 1.414(l)-1(b)(1)(i) (1995) (providing that, for income tax purposes, pension plan will be considered as "single plan" even if "plan has several distinct benefit structures"). Thus,

[5] Exhibits "A" and "B" to the Plan set forth provisions specific to the contributory and non-contributory benefit structures, respectively.

Hughes' use of Plan assets to fund benefits under the non-contributory benefit structure is unobjectionable under ERISA.

Although plaintiffs' theory is less than clear, they seem to be arguing that under § 403(c)(1), Hughes may not use fund assets to pay benefits to Plan participants enrolled under the non-contributory structure as long as a surplus exists, i.e., as long as the Plan is overfunded. Plaintiffs' rationale is that they are entitled to a share of the surplus because it is attributable at least in part to the investment growth on their contributions. This argument has no merit whatsoever. The existence of a surplus does not and cannot possibly serve as a basis for claiming that Hughes violated § 403(c)(1) by paying pension benefits out of fund assets. Using fund assets to pay pension benefits to Plan participants is not only allowed under the anti-inurement provision, it is *required*. ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1) ("[T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.").

Whether or not a fund is overfunded at a particular point in time is irrelevant under § 403(c)(1). The existence of a "surplus" in a pension fund is nothing more than an actuarial artifact. As plaintiffs themselves explain, a pension plan is "overfunded" at any point in time in which the present value of the Plan's assets exceeds the actuarially determined value of the Plan's liabilities. Appellant's Br. at 5. The only legal significance of a state of overfunding is that Hughes' obligation to pay into the Plan fund is temporarily suspended as long as the condition of overfunding exists. At all times, whether the fund's investment portfolio is prospering or heading south, Hughes' obligation to assure the financial health of the Plan remains constant.

It is inconceivable that Congress intended the lawfulness of a plan amendment to turn on whether a "surplus" existed at the

time of the amendment. Whether or not a surplus existed is logically irrelevant to the question whether the 1991 amendment adding a non-contributory benefit structure violated ERISA's anti-inurement provision. As written by Congress, § 403(c)(1) requires us to focus on the use the employer makes of pension fund assets, not whether the plan is overfunded. In focusing on the existence of the surplus, both the plaintiffs and the majority ignore the plain language of § 403(c)(1), which restricts the use of fund assets to the payment of pension benefits to plan participants.

Plaintiffs also seem to be arguing that § 403(c)(1) prohibits Hughes from using Plan assets to pay pension benefits to *new* employees (i.e., employees who joined the Plan after the effective date of the 1991 amendment), all of whom were required to enroll under the non-contributory structure. Again, the plaintiffs' rationale seems to be that the surplus is attributable in part to the contributions made by old employees before the effective date of the 1991 amendment. This argument, too, is meritless. There is no basis in § 403(c)(1) or in the Plan itself for distinguishing new employees from old employees in this manner. Both new and old employees are participants in the Hughes Plan, and Hughes is thus *required* under § 403(c)(1) to use Plan funds to pay pension benefits to both. In essence, plaintiffs are again claiming that Hughes somehow violated § 403(c)(1) when it used Plan funds to pay pension benefits to Plan participants.

Finally, plaintiffs seem to be arguing that § 403(c)(1) prohibits Hughes from using Plan funds to pay pension benefits to employees, new or old, enrolled under the non-contributory structure. This argument is also without merit. In order to make sense of their argument, the plaintiffs must distinguish between two subsets of pre-amendment employees--those who elected to remain enrolled under the contributory structure, and those who elected to switch to the non- contributory structure. The plaintiffs do not, and cannot, draw this distinction. The only difference between these two subsets of old employees is

that one group chose to contribute a portion of their paychecks to the fund and receive greater pension benefits in return, while the other group chose to accept a lower level of pension benefits so they could keep their full paychecks for current use. Surely the plaintiffs do not mean to say that § 403(c)(1) prohbits the use of Plan funds to pay benefits to these employees simply because they exercised their option to switch to the non-contributory structure. In sum, I see no basis in § 403(c)(1) or any other provision of ERISA for plaintiffs' argument that ERISA forbids Hughes from using Plan assets to pay pension benefits to *all* Plan participants, whether enrolled under the contributory or non-contributory benefit structure.

Despite the fact that nothing in § 403(c)(1) forbids Hughes from using Plan assets to pay benefits to Plan participants, the majority reverses the district court's § 12(b)(6) dismissal of the action and remands for further proceedings because it finds an unresolved issue of material fact, namely, whether the 1991 amendment to the Plan adding a non-contributory benefit structure effected a termination of the Plan. If the Plan is terminated, then § 4044(d) of ERISA, 29 U.S.C. § 1344(d), kicks in and requires an equitable distribution of the Plan assets after all Plan liabilities are satisfied. If such a distribution were to occur, the named plaintiffs, as retirees who made contributions to the Plan before their retirement, would receive a share of the $1 billion surplus (if it still exists),[6] in addition to the defined pension benefits they are now entitled to.

The majority is incorrect in saying that there is a material issue of fact standing in the way of affirming the district court's § 12(b)(6) dismissal of this action. The plaintiffs' quest to have the Hughes Plan terminated and its assets distributed is based on the following facts, none of which is in dispute:

1. The Hughes Plan existed as a contributory plan;

[6] It is possible, of course, that the Plan's investments have declined in value since plaintiffs filed their complaint in 1992, and that the surplus has therefore diminished or disappeared.

2. The successful investment of Plan funds resulted in a surplus of $1 billion;

3. The Hughes Plan was amended to create a non-contributory benefit structure that was made optional for existing employees and mandatory for new employees;

4. The new employees and those existing employees who opted to enroll under the non-contributory structure make no contributions to the Plan fund and receive lesser benefits than existing employees who opt to remain enrolled under the contributory structure; and

5. The assets of the Hughes Plan, including any "surplus" that may exist, are used to fund pension benefits under both the contributory and non-contributory benefit structures.

The majority does not and cannot disagree that these material facts are undisputed. The "question of fact" that the majority does rely upon to justify a remand is the question whether the amendment terminated the Plan altogether. Opinion at 887. That, however, is not a question of fact, but a question of law.

The record is clear that plaintiffs have alleged all the facts necessary for deciding the *legal* question of whether ERISA forbids Hughes from amending its contributory pension plan to add a non-contributory benefit structure. The plaintiffs' theory is that Hughes violated the anti-inurement provision of ERISA by creating a new and separate non-contributory plan and using the assets of its contributory plan to discharge its obligations to fund the new plan. In doing all this, plaintiffs argue, Hughes used the assets of the Plan for its own purposes rather than "for the exclusive purposes of providing benefits to the participants of the plan" in violation of § 403(c)(1), 29 U.S.C. § 1103(c)(1), the anti-inurement provision of ERISA, resulting in a termination of the Hughes Plan and an equitable distribution of the surplus pursuant to ERISA § 4044(d), 29 U.S.C. § 1344(d).

In accepting plaintiffs' anti-inurement claim as viable, the majority relies upon neither of the two cases the plaintiffs cite in support of that claim, *Bridgestone/Firestone, Inc. v. Pension Benefit Guar. Corp.*, 892 F.2d 105 (D.C. Cir. 1989) and *Holland v. Amalgamated Sugar Co.*, 787 F. Supp. 996 (D. Utah 1992), *aff'd in part & rev'd in part sub nom. Holland v. Valhi, Inc.*, 22 F.3d 968 (10th Cir.1994). The majority's omission is understandable since the cases are not on point. *Bridgestone* and *Holland* deal with the process of distributing a pension plan's assets under § 4044(d), 29 U.S.C. § 1344(d), once a plan has been terminated. As a result, the cases do not address the antecedent question we are confronted with, which is *whether* a plan has been terminated in the first place.

The majority cites no authority for its holding that plaintiffs' anti-inurement and termination theories are sufficiently viable to survive Hughes' motion to dismiss. It does not claim that either of the cases it cites, *Lockheed*, 116 S.Ct. at 1783, and *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402 (2d Cir.1985), *cert. dismissed*, 474 U.S. 1113 (1986), supports its view. Rather, the majority cites these cases only to distinguish them and to claim they do not stand in the way. Both *Lockheed* and *Amato* stand for the proposition that an employer does not act in its fiduciary capacity when amending a pension plan, and that a plan amendment adding a new benefit structure does not violate ERISA. The majority attempts to distinguish both *Lockheed* and *Amato* on the ground that each involved an amendment to a non-contributory plan, while this case involves an amendment to a contributory plan. However, there is nothing in either the *Lockheed* or *Amato* opinion indicating that either holding should be limited to non-contributory plans. In fact, neither *Lockheed* or *Amato* mentions whether the plan at issue was contributory or non-contributory. In other words, there is no basis whatsoever for limiting the precedential value of these cases to non-contributory plans, as the majority does.

This contributory/non-contributory dichotomy is the heart of the majority's analysis. The dichotomy, however, is a false one for the purpose of deciding whether Hughes violated ERISA in adding a non-contributory benefit structure to the Plan. There are, of course, contractual differences between the two types of pension plan, as the facts of this case illustrate. Under the contributory benefit structure, the employee makes cash contributions to the Plan and receives greater benefits. Under the non-contributory structure, the employee contributes nothing to the Plan and receives lesser benefits. Either way, the benefits are provided out of a single fund and it is the ultimate responsibility of Hughes to make whatever contributions are necessary to assure that the fund does not accumulate a "funding deficiency." *See supra* Part I, at 906. In terms of economic reality, it should make no difference whether an employee makes contributions to a plan directly, or whether the employee makes contributions indirectly through the employer. Either way, the contributions are the economic product of the employee's services.

To be sure, there are provisions in ERISA that are designed for the protection of an employee's contributions to a pension plan. An employee's contributions are always nonforfeitable, which means that the employee has a legally enforceable right to recover his contributions with interest, even if he leaves the plan before reaching normal retirement age. ERISA § 203(a)(1), 29 U.S.C. § 1053(a)(1). In addition, if a plan is terminated, participants are entitled to an equitable distribution of the surplus, with each share proportional to the individual participant's contributions, as long as all other plan liabilities are first satisfied. 29 U.S.C. § 1344(d)(3). Except for these protections for employee contributions, ERISA limits an employee's interest in a pension plan fund to his "accrued benefits," which are the benefits defined under the terms of the plan. 29 U.S.C. § 1002(23). *See also Johnson*, 19 F.3d at 1189 (rejecting retirees' claim that they were entitled to the same benefits increase as active employees when surplus resulted in part from retirees' contributions, reasoning that because "a

defined-benefit plan gives current and former employees property interests in their pension benefits but not in the assets held by the trust").

The ERISA provisions protecting employee contributions have no bearing on the question whether Hughes violated ERISA in amending its contributory plan to add a non-contributory benefit structure. On this point the majority and I are in sharp disagreement. The majority asserts that the distinction between the two types of pension plans is "critical" to the termination question, but offers no cogent reason why it is "critical" or even relevant. Opinion at 887. The only authority cited by the majority is §§ 203 and 4044(d)(3)(A) of ERISA, 29 U.S.C. §§ 1053 and 1344(d)(3)(A), which—as discussed above—respectively establish minimum vesting requirements for accrued benefits derived from employee contributions, and provide that *in the event a pension plan is terminated*, any surplus assets attributable to employee contributions shall be distributed equitably to participants who have made contributions. But how do provisions governing nonforfeiture of accrued benefits, on the one hand, and distribution of assets once a plan is terminated, on the other, help us decide *whether* a plan has been terminated? The majority's only answer is that the plaintiffs have *alleged* that the non-contributory amendment resulted in the termination of the contributory plan. Opinion at 888. If this allegation were an allegation of fact, we would be obliged to accept it as true on this 12(b)(6) motion. But it is not an allegation of fact.[7] It is a conclusion of law. And it is a conclusion of law that cannot be reached except by following the circular path traveled by the majority.

To repeat, the majority has ordered a remand because of what it views as an unresolved issue of fact—whether the

[7] The majority leaves us clueless as to how a jury could be instructed to resolve as a question of fact whether the 1991 amendment effected a termination of the Plan.

amendment adding the non-contributory benefit structure resulted in the termination of the Hughes Plan. In my view, and the view of the district court, this is a pure question of law.

The majority also views the question whether any benefit Hughes received from the asset surplus was more than "incidental" as a question of material fact that cannot be resolved at the 12(b)(6) stage. Opinion at 890. The question, however, is beside the point. Whether an employer might realize cost savings from an amendment to a pension plan is not a factor Congress intended courts to consider in deciding whether a pension plan amendment violates ERISA's anti-inurement provision. The focus of our inquiry under ERISA's anti-inurement provision must be whether Hughes used Plan assets for a purpose other than the payment of benefits to Plan participants. The answer to that question is clearly no. The district court's dismissal of plaintiffs' § 403(c)(1) anti-inurement claim should be affirmed.

II

Second Claim: The 1991 Amendment as a Breach of Fiduciary Duty

In their second claim, plaintiffs assert that Hughes breached its fiduciary duties under ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A),[8] by "utilizing excess Plan assets attributable to employer and employee participant contributions for the exclusive benefit of defendant Hughes rather than for the benefit of Plan participants and their beneficiaries." Compl. ¶ 34. In their brief, plaintiffs argue that Hughes violated

[8] ERISA § 404(a)(1)(A) provides in relevant part:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan. . . .

29 U.S.C. § 1104(a)(1)(A).

§ 404(a)(1)(A) "by expending surplus assets, especially those *attributable to employee contributions*, not to provide benefits to participants of the Contributory Plan, but rather to participants of the new Non-Contributory Plan whose benefits Hughes is obligated to fund." Appellants' Br. at 14-15 (emphasis in original).

Plaintiffs' second claim is not substantively different from their first claim. They merely allege a violation of the general fiduciary duty provision of ERISA, § 404(a)(1)(A), rather than the anti-inurement provision, § 403(c)(1). As such, plaintiffs' second claim is directly foreclosed by *Lockheed*'s holding that without exception, "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." 116 S.Ct. at 1789. For the reasons stated in connection with plaintiffs' first claim, I do not agree with the majority that the Plan amendments enacted by Hughes implicated ERISA's fiduciary obligations because the Plan was a contributory plan. *See* Opinion at 891-92. To repeat, with minor exceptions, ERISA limits an employee's interest in a pension plan fund to his "accrued benefits," which are the benefits defined under the plan. 29 U.S.C. § 1002(23).

The district court's dismissal of plaintiffs' § 404(a)(1)(A) claim should be affirmed.

III

Third Claim: Vesting Requirements

In their third claim, plaintiffs allege that Hughes violated ERISA § 203(a)(1), 29 U.S.C. § 1053(a)(1),[9] "by using assets attributable to employees [sic] . . . contributions to meet [its own] funding obligations and [has] therefore caused a

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[9] ERISA § 203(a)(1) provides:

> A plan satisfies the requirements of [ERISA's minimum vesting standards] if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

29 U.S.C. § 1053(a)(1).

divestiture and forfeiture of rights." Compl. ¶ 36. This claim is based upon a misunderstanding of § 203(a)(1), which establishes minimum vesting standards. The purpose of § 203(a) is to guide courts in determining the percentage of an employee's pension benefits that cannot be divested under various circumstances.[10] In short, § 203(a)(1) sets out a vesting schedule that "address[es] the problem of how much to limit an employer's power to withdraw previously offered benefits." *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160 (3d Cir.1990). This claim also fails.

The plaintiffs do not allege that Hughes has ever withdrawn previously offered benefits. They do not allege that the 1991 amendment diminished in any way the defined benefits to which Plan participants enrolled at the time of the Amendment were entitled. In fact, employees active in the Plan before the 1991 amendment's effective date were given the choice between remaining enrolled in the contributory benefit structure and switching to the non-contributory structure. Retired members, all of whom had been enrolled in the contributory benefit structure, continued to receive the same defined benefits they were always entitled to under the Plan.

Although plaintiffs continue to receive their defined benefits under the Plan, they argue that the vesting provisions of § 203(a)(1) entitle them to benefits greater than those defined in the Plan. According to plaintiffs, § 203(a)(1) vests them 100% in their "own contributions and what they have earned." Appellants' Br. at 19. The plaintiffs are mistaken. Section 203(a)(1) requires that an employee's rights in the

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[10] For example, § 203(a) applies when an employee becomes disabled, *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); when an employee has a break in service to a company, *Bolton v. Construction Laborers' Pension Trust*, 954 F.2d 1437 (9th Cir.1991); when a noncompetition forfeiture clause applies, *Clark v. Lauren Young Tire Ctr. Profit Sharing Trust*, 816 F.2d 480 (9th Cir.1987); or when an employee dies, *Hernandez v. Southern Nevada Culinary & Bartenders Pension Trust*, 662 F.2d 617 (9th Cir.1981).

accrued benefit derived from his own contributions be nonforfeitable. 29 U.S.C. § 1053(a)(1) ("A plan satisfies [ERISA's minimum vesting standards] if an employee's rights in his *accrued benefit* derived from his own contributions are nonforfeitable.") (emphasis added). Nothing in the Plan or ERISA gives plaintiffs an ownership right in the investment return on their contributions. Under both the Plan and ERISA, plaintiffs are entitled to nothing more than their accrued benefits, which are the defined pension benefits they are now receiving. *See* ERISA § 3(23), 29 U.S.C. § 1002(23) (providing that "accrued benefits" are defined solely by terms of pension plans).

The district court's dismissal of plaintiffs' § 203(a)(1) should be affirmed.

IV

Fourth Claim: "Wasting Trust"

The plaintiffs' fourth claim is based solely on the theory that the 1991 amendment creating the non-contributory benefit structure somehow had the effect of converting the Plan into a "wasting or dry trust." The plaintiffs do not explain what they mean by the term "wasting trust," nor do they explain how the creation of a non-contributory benefit structure could possibly turn the Plan into a "wasting trust." The plaintiffs' argument in support of this claim is limited to a citation of a single case, *In re Gulf Pension Litig.*, 764 F. Supp. 1149 (S.D. Tex. 1991), *aff'd* on other grounds *sub nom. Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir.1994). They make no attempt to show that the two cases share any facts that might be material to their wasting trust theory.

In *Gulf Pension*, the district court described the "wasting or dry trust" doctrine as the principle "[a]t common law [that] if a trust did not state a definite term, it was deemed to last until its purpose was accomplished." *Id.* at 1202. The court deemed the *Gulf Pension* plan to have been terminated because all of its

purposes had been accomplished. *Id.* at 1203. The *Gulf Pension* court explained:

> [Plan] membership has long been closed and the plans are substantially overfunded as to all future liabilities. The [pension plans] are not accruing significant benefit obligations that could potentially eliminate their surpluses. Nor could the surpluses be used to eliminate or reduce future employer contributions since none have been made since 1970. Therefore, . . . delaying termination of the . . . trusts would benefit neither the plans nor their participants in the future.

Id. at 1204. The *Gulf Pension* court based its finding that all the trust's purposes had been accomplished on the following facts: Only 2900 active employees and 16,000 retirees were enrolled in the *Gulf Pension* plan. *Id.* at 1203. Retired members accounted for 94% of the *Gulf Pension* plan's liabilities. *Id.* In addition, most of the active members were nearing retirement, which meant that projected benefits for their future service were "*de minimis* in relation to the surplus assets in the plans." *Id.*

The plaintiffs allege no facts of the kind relied upon by the *Gulf Pension* court in finding a "wasting trust." Most notably, plaintiffs do not allege that the Hughes Plan's purposes have been accomplished. Indeed, the only fact alleged in the wasting trust claim is that the Hughes Plan was amended in 1991 to create a non-contributory benefit structure. The plaintiffs do not even attempt to explain why there is any logical connection between the 1991 amendment and their wasting trust theory. All they do is cite *Gulf Pension*.

The majority cites the district court's decision in *Gulf Pension* in a footnote, contending that plaintiffs' allegations that the 1991 amendment adding a non-contributory benefit structure converted the Plan into a wasting trust survive a Rule 12(b)(6) challenge because the "question of when a termination occurs is a mixed question of law and fact." Opinion at 888 n. 3. In the view of the majority the questions of whether the

"Contributory Plan's [sic] purposes have been accomplished and whether its liabilities are fixed enough to terminate the plan" are material questions that can only be answered after discovery. *Id.* at 889. I disagree. As explained above, I believe that, as a matter of law, the Plan was not terminated by the addition of a non-contributory benefit structure.

The district court's dismissal of plaintiffs' wasting trust claim should be affirmed.

V

Fifth Claim: Transfer to a Party in Interest

In their fifth claim, plaintiffs argue that use of assets from the "contributory plan" to fund the benefits of participants in the "non-contributory plan" constitutes a use or transfer to Hughes, a party in interest, in violation of ERISA §§ 406(a)(1)(D) & (b)(2), 29 U.S.C. § 1106(a)(1)(D) & (b)(2).[11] The analysis I apply in rejecting plaintiffs' first and second claims is also applicable to the fifth claim. *See supra* Parts I and II.

I would find no violation of § 406 even if Hughes had created two separate pension plans, one contributory and the

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[11] ERISA § 406(a)(1)(D) provides:

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. . . .

29 U.S.C. § 1106(a)(1)(D).

ERISA § 406(b)(2) provides:

> A fiduciary with respect to a plan shall not . . . in his individual capacity or in any other capacity act in any transaction involving the plan on behalf of a party . . . whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. . . .

29 U.S.C. § 1106(b)(2).

other non-contributory. Notwithstanding any incidental benefit Hughes might have received from the 1991 amendment, Hughes did not transfer funds to itself as a party in interest. Indeed, the "payment of benefits conditioned on performance by plan participants cannot reasonably be said to [come within the scope of § 406]." *Lockheed*, 116 S.Ct. at 1791 (holding that employer did not violate § 406 when it amended its retirement plan to create a new benefits schedule with new conditions for eligibility to be paid for from the plan's asset surplus). Nothing in ERISA prohibits two different benefit structures from being funded from one source. *Cf. Holliday v. Xerox Corp.*, 732 F.2d 548, 551 (6th Cir.), *cert. denied*, 469 U.S. 917 (1984) (holding that transfer of funds from one pension account to another, and subsequent use of transferred funds as setoff in calculating retirement benefits, was permissible under ERISA); Treas.Reg. § 1.414(l)-1(b)(1)(i), 26 C.F.R. § 1.414(l)-1(b)(1)(i) (1995) (providing that, for income tax purposes, pension plan will be considered as "single plan" even if "plan has several distinct benefit structures"). Because the amendment was within Hughes' power as a settlor, *see supra* Part I, and because Hughes did not transfer assets to itself as a party in interest, I would affirm the district court's dismissal of plaintiffs' fifth claim, which is based on § 406.[12]

VI

Sixth Claim: The Early Retirement Program as a Breach of Fiduciary Duty

The plaintiffs' sixth claim is based upon a 1989 amendment to the Hughes Plan. In the 1989 amendment, Hughes created an early retirement program which offered improved retirement benefits to some active employees who elected to take early retirement. The 1989 amendment made no changes in the

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[12] Plaintiffs make no allegations of fact to support their claim that Hughes' amendment of the plan was a "sham transaction" meant to disguise an otherwise unlawful act. They merely allege "sham" in a conclusory fashion.

defined benefits that retirees, such as plaintiffs in this action, were already receiving.

The plaintiffs claim that, in creating the early retirement program, Hughes violated its fiduciary duties under ERISA § 404(a)(1)(D), which requires plan fiduciaries to carry out their duties "in accordance with the documents and instruments governing the plan. . . ." 29 U.S.C. § 1104(a)(1)(D). The plaintiffs argue that Hughes violated this section because the 1989 amendment discriminated against plaintiffs in providing that Plan assets would be used to fund improved benefits exclusively for those active employees who were made eligible for early retirement. According to plaintiffs, this use of Plan assets contravened Article V, § 5.2 of the Plan, which provides that the "Plan shall be administered, interpreted and applied fairly and equitably and in accordance with the specified purposes of the Plan." The majority acknowledges that, in *Lockheed*, the Supreme Court held that an employer may amend a retirement plan to offer an early retirement program funded by surplus plan assets without violating ERISA. Nonetheless, the majority holds that plaintiffs have stated a claim under § 404(a)(1) because the assets used to fund Hughes' early retirement program are in part attributable to employee contributions.

The majority's holding cannot be squared with *Lockheed*, nor with cases from two other circuits which have held that pension plan amendments that create retirement windows with incentives for early retirement do not violate § 404(a)(1) of ERISA. *Belade v. ITT Corp.*, 909 F.2d 736, 737-38 (2d Cir.1990); *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir.1987), *cert. denied*, 485 U.S. 1022 (1988). These cases emphasize the precept that when an employer amends a plan, just as when an employer first designs a plan, it acts as a *settlor* and not as a *fiduciary*. *Lockheed*, 116 S.Ct. at 1789; *Belade*, 909 F.2d at 738; *Trenton*, 832 F.2d at 809; *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1190 (7th Cir. 1994)

(holding that plan amendment improving benefits for active workers does not violate § 404(a)(1)); *see also supra* Part I.

To distinguish *Lockheed*, the majority again relies on a purported distinction between contributory and non-contributory benefit structures.[13] Without citing any authority, the majority asserts that it "do[es] not think that an employer can unilaterally decide to use plan assets attributable to employee contributions without implicating ERISA's fiduciary obligations." Opinion at 903. The majority seems to be saying that employees are co-settlors of contributory plans. The majority, of course, offers no authority for this startling proposition. Moreover, even if we treated employees as settlors of contributory plans, the majority still fails to explain how that makes their ostensible co-settlor, Hughes, a "fiduciary" within the meaning of § 404(a).

Although plaintiffs assert that the early retirement amendment "raises all of the same issues presented in" the first five claims, Appellants' Br. at 30, they fail to elaborate any further. I see no violation of any section of ERISA in Hughes' creation of the early retirement program. The district court's dismissal of plaintiffs' claims regarding the 1989 amendment should be affirmed.

CONCLUSION

The majority holds that plaintiffs have stated a claim upon which relief can be granted under ERISA on the theory that Hughes terminated the Plan when it merely amended it to include a non-contributory benefit structure as well as a contributory benefit structure. Thus, the majority clears the way for plaintiffs to continue on their quest for their pot of gold, a share of the $1 billion surplus. If plaintiffs ultimately succeed in obtaining a judgment declaring the contributory plan to be terminated, their pensions will no longer be limited

[13] The only valid distinctions between contributory and non-contributory benefit structures are discussed *supra* in Part I, at 914.

to their "defined benefits." It is understandable that the plaintiffs (and their lawyers) covet the financial gains that resulted from the successful investment strategy that dramatically increased the value of the Plan's assets in the 1980s. But that does not diminish the reality that they have failed to state a legally cognizable claim.

Moreover, the majority's decision may have serious adverse consequences for the 10,000-odd participants in the Hughes Plan if this litigation ends in a judicial decree terminating the Plan and distributing the Plan assets. If the Plan continues to run a sizeable surplus as a result of a successful investment portfolio, retirees like the plaintiffs in this action would get a windfall over and above their defined pension benefits. It is not clear, however, where this would leave Plan participants who are still working toward retirement, including those existing employees who opted to remain covered under the contributory benefit structure, those who opted for the non-contributory structure, and the new employees who are enrolled under the non-contributory benefit structure as a matter of plan design.

In addition, the unfortunate effects of the majority's decision may extend well beyond the parties in this particular action. Today's decision announces that in the Ninth Circuit there are severe, if vague and ill-defined, restrictions on the discretion of employers charged as plan settlors under ERISA with responsibility for the design of qualified pension plans. Only time can tell what impact these vague and uncertain restrictions will have on employers and their employees.

In my view, there is no basis in ERISA, the caselaw, or logic for the majority's decision that in amending its pension plan, Hughes effectively terminated the plan. If ERISA is in need of clarifying or restricting amendments to the provisions relating to the authority of employers as settlors to design pension plans, that need should be addressed by Congress, not this court.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STANLEY I. JACOBSON; Daniel P. Welsh; Robert E. McMillin; Ernest O. Blandin; Richard E. Hook,

Plaintiffs-Appellants,

v.

HUGHES AIRCRAFT COMPANY; Hughes Non-Bargaining Retirement Plan,

Defendants-Appellees.

No. 93-55392
D.C. No. CV-92-04020-RG

Amended October 23, 1997

Before: Betty B. Fletcher, Harry Pregerson, and William A. Norris, Circuit Judges

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING

The majority opinion, filed January 23, 1997, is amended as follows:

At Slip Opinion page 888 footnote 3, delete the first sentence of the second paragraph and delete the last sentence of the third paragraph.

At Slip Opinion page 900, delete the first full paragraph starting with "In determining whether . . ." and ending with ". . . to ERISA context)."

With the above amendment, a majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STANLEY I. JACOBSON; Daniel P. Welsh; Robert E. McMillin; Ernest O. Blandin; Richard E. Hook,

Plaintiffs-Appellants,

v.

HUGHES AIRCRAFT COMPANY; Hughes Non-Bargaining Retirement Plan,

Defendants-Appellees.

No. 93-55392
D.C. No. CV-92-04020-RG

Filed January 23, 1998

Before: Betty B. Fletcher and Harry Pregerson, Circuit Judges.

ORDER CLARIFYING THE ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING, FILED OCTOBER 23, 1997

In response to the Motion for Clarification filed by Defendants-Appellees Hughes Aircraft Company and Hughes Non-Bargaining Retirement Plan, filed December 2, 1997, the Order Amending Opinion and Denying Petition for Rehearing, filed October 23, 1997, is clarified and amended as follows:

At Slip Opinion page 888 in footnote 3, in the third paragraph, the deletion should be only of the sentence "The question of when a termination occurs is a mixed question of law and fact." The citation should be corrected as follows: "*See* 26 C.F.R. § 1.401. . . ."

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN and RICHARD E. HOOK,

Plaintiffs,

v.

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Defendants.

CASE NO. CV-92-4020-RG (Bx)

ORDER OF DISMISSAL OF ACTION

This cause came on for hearing on December 14, 1992, before the Honorable Richard A. Gadbois, Jr., United States District Judge, presiding, on the motion of plaintiffs Stanley I. Jacobson, Daniel P. Welsh, Robert E. McMillin, Ernst O. Blandin and Richard E. Hook ("plaintiffs") for relief from an order dismissing the complaint issued on October 19, 1992, and for an order vacating the dismissal. Previously, the motion of defendants Hughes Aircraft Company ("Hughes") and Hughes Non-Bargaining Retirement Plan (the "Plan") (collectively "defendants") to dismiss the complaint, and each cause of action therein, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted or, alternatively, for a more definite statement pursuant to Rule 12(e) and to strike portions of the complaint pursuant to Rule 12(f), had come on for hearing on October 19, 1992. Plaintiffs had at that time filed no opposition pleading

to defendants' motions and had failed to appear at the hearing.[14] The Court granted defendants' motion to dismiss with leave to amend.

Plaintiffs' then responded with their motion for relief from the order of dismissal, and included with their motion an opposition to defendants' motion to dismiss. At the hearing on plaintiffs' motion for relief, the Court announced that it would consider plaintiffs' opposition to the motion to dismiss on the merits, and granted defendants the opportunity to reply to plaintiffs' opposition. Defendants thereafter filed their reply.

The Court, having considered plaintiffs' motion for relief from the prior order dismissing the complaint, having considered plaintiffs' opposition to defendants' motion to dismiss and the pleadings and files herein, having heard the argument of counsel and having concluded that defendants' motion to dismiss should be granted, finds as follows:

1. This action arises under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq*. Plaintiffs include individual participants in the Hughes Non-Bargaining Retirement Plan. The action was commenced as a purported class action pursuant to Rule 23(b)(1) & (2) of the Federal Rules of Civil Procedure. (Complaint ¶¶ 10-12).

2. Defendants in this action are Hughes Aircraft Company and the Hughes Non-Bargaining Retirement Plan.

3. The complaint purports to state six causes of action, each alleging that various provisions of ERISA have been violated. Plaintiffs do not allege that the Plan has failed to provide any benefits due under the Plan, nor that the Plan lacks

[14] Counsel for defendants, who was present at the hearing, stated to the Court that, subject to the approval of the Court, he had previously agreed to and signed a stipulation for a continuance for the filing of plaintiffs' opposition and for the hearing, but no written request by plaintiffs for a continuance had been received by the Court as of the time of the hearing.

sufficient assets to pay all accrued benefits (vested or non-vested) due the participants. Rather, the essence of plaintiffs' complaint is that the Plan was effectively terminated when it was amended effective January 1, 1991 (Complaint ¶ 4), and that, therefore, certain excess Plan assets should be distributed to them in the form of "improved pension benefits." (Complaint ¶ 1.) Plaintiffs further allege that because of a surplus of assets in the Plan, Hughes did not make contributions to the Plan from 1986 to 1990, and may not be required to make contributions in the future. (Complaint ¶¶ 3, 25, 29, 30.) Accordingly, plaintiffs contend that defendants are "using" Plan assets attributable to employee contributions to meet "defendants funding obligaitons." (Complaint ¶¶ 35, 36.)

4. In their first cause of action, plaintiffs allege that defendants have violated ERISA Section 403(c)(1), 29 U.S.C. § 1103(c)(1), the "anti-inurement" provision, "by utilizing excess plan assets attributable to employer and employee contributions for the sole and exclusive benefit of the employer and to the detriment of participants and the class they represent." (Complaint ¶¶ 31-32.) Plaintiffs claim that by not making contributions to the Plan for several years, Hughes "utilized" surplus assets in the Plan generated by employer and employee contributions to meet its funding obligations.

5. Assuming the truth of those allegations for the purposes of this motion to dismiss, such conduct does not violate ERISA's anti-inurement provision for at least the following reasons:

(a) Plaintiffs' allegation that the Plan has terminated is inconsistent with their argument that the anti-inurement provision has been violated. In the event of a plan termination, the reversion of surplus assets to participants is expressly governed by ERISA Section 4044, 29 U.S.C. § 1344. As plaintiffs do not allege that the provisions of ERISA Section 4044 have been violated, they implicitly acknowledge that in fact there has not been a Plan termination. Consequently, unless and until a Plan termination occurs, plaintiffs are

entitled to nothing other than the Plan's defined benefits, and they have no vested right to surplus assets.

(b) While plaintiffs contend that Hughes is improperly utilizing excess funding "due to employee contributions," the Plan is a "defined benefit plan" and the excess funding is that of the Plan and is due to all contributions, including those of Hughes. *See, e.g.*, ERISA Section 302, 29 U.S.C. § 1082. No participant has a right to the surplus assets, but instead is entitled to the defined benefit (including any accrued benefit due to his contributions, 29 U.S.C. § 1054(c)(2)(B) & (C)).

(c) The terms of the Plan impose an obligation on Hughes to contribute to the Plan only when necessary to ensure sufficient funding, and correlatively permits Hughes to cease making contributions when a surplus exists.[15] Both before and after the 1991 Plan amendments, the Plan provided in Section 3.1 that "the cost of Benefits under the Plan to the extent not provided by contributions of Participants under Section 3.4 shall be provided by contributions of the Companies." Additionally, Section 6.2 of the Plan expressly states that "a Company shall have the right to suspend its contributions to the plan at any time." Therefore, Hughes has satisfied its funding obligations under the terms of the Plan.

(d) There is no requirement under ERISA that imposes a duty upon an employer to continue contributing to an already overfunded plan, even when the plan is funded, in part, by employee contributions. *Fechter v. HMW Indus., Inc.*, 879 F.2d 1111(3d Cir. 1989); *LLC Corp. v. Pension Benefit*

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[15] Plaintiffs did not elect to attach copies of the Plan documents to the complaint, although they purport to rely upon such documents in their complaint. Defendants are entitled, therefore, to introduce these documents as part of their motion to dismiss under Rule 12(b)(6). 5 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1327, pp. 760-61 (2d ed. 1990); *Fudge v. Penthouse Int'l., Ltd.*, 840 F.2d 1012, 1014-15 (1st Cir. 1988); *Ed Miniat. Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 739 n.12 (7th Cir. 1986). *Cf. Interstate Natural Gas Co. v. Southern Calif. Gas Co.*, 209 F.2d 380 (9th Cir. 1953).

Guaranty Corp., 703 F.2d 301, 302 (8th Cir. 1983). Indeed, once the Plan became overfunded, Hughes had to halt contributions or its contributions would have been treated as non-deductible expenses and it would have incurred a 10% tax penalty on such excess contributions. 26 U.S.C. § 404(a)(1)(A), § 4972(c)(1)(B).

(e) ERISA's anti-inurement provision is not violated absent action such as employer withdrawals or threatened withdrawals of plan assets, neither of which has occurred here. *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1414 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986). As the court in *Aldridge v. Lily-Tulip, Inc.*, 741 F. Supp. 906, 919 (S.D. Ga. 1990), *aff'd in relevant part*, 953 F.2d 587 (11th Cir. 1992) noted, a plaintiff must show that the employer's use of plan assets "result[ed] in a direct gain to the employer." Incidental benefits, such as increased employee productivity and morale, are insufficient to state a claim. *Id. See also Holiday v. Xerox Corp.*, 732 F.2d 548, 551 (6th Cir.), *cert. denied*, 469 U.S. 917 (1984); *Constantino v. TRW, Inc.*, 773 F. Supp. 34, 44-45 (N.D. Ohio 1991).

6. In their second cause of action, plaintiffs allege that defendants have a fiduciary duty, pursuant to ERISA Section 404(a)(1)(A) & (B), 29 U.S.C. § 1104(a)(1)(A) & (B), to utilize "excess Plan assets attributable to employer and employee participant contributions for the exclusive benefit of . . . plan participants and their beneficiaries." (Complaint ¶ 33.) Plaintiffs contend that defendants have breached this duty by utilizing "excess Plan assets" for the exclusive benefit of Hughes, in that Hughes filed to make contributions to the Plan from 1986 to 1990, and may not make contributions in the future. (Complaint ¶¶ 25, 29, 34.) Plaintiffs also allege that a fiduciary breach arises from Hughes' 1991 amendments of the Plan, which plaintiffs claim created a new non-contributory plan.

7. An entity acts as a fiduciary only when it exercises discretion as to plan management, renders investment advice or

exercises discretion as to plan administration. ERISA Section 3(21), 29 U.S.C. § 1002(21). Plan design, however, is an exercise of an employer's settlor or design function and does not implicate fiduciary obligations. *See, e.g., Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1159-60 (3d Cir. 1990); *Cuhna v. Ward Foods, Inc.*, 804 F.2d 1418, 1432 (9th Cir. 1986). As only an employer, and not a fiduciary, makes contributions to a plan and as Hughes had no obligation to make contributions to an overfunded plan, there is no breach of fiduciary duty with respect to funding the Plan. Further, an employer's decision to amend a plan to provide for surplus asset reversion to the employer is a plan design decision which does not implicate fiduciary functions. *See Bigger v. American Commercial Lines, Inc.*, 862 F.2d 1341, 1347 (8th Cir. 1988); *Foster Medical Corp. Employees' Pension Plan v. Heathco, Inc.*, 753 F.2d 194, 199 (1st Cir. 1985); *Lynch v. J.P. Stevens & Co.*, 758 F. Supp. 976, 996 (D.N.J. 1991); *Chait v. Bernstein*, 645 F. Supp. 1092, 1100 (D.N.J. 1986), *aff'd*, 835 F.2d 1017 (3rd Cir. 1987).

8. Plaintiffs' second cause of action is further based upon the claim that the Plan as amended is in fact two plans. This assumption is erroneous upon the face of the Plan documents, and it is readily apparent that the contributory benefits structure remains in effect as part of the single Plan.

9. Plaintiffs' third cause of action alleges that Hughes has utilized assets "attributable to employees own contributions" to meet its funding obligations, and has thereby effected a forfeiture of employee rights in violation of ERISA Section 203(a), 29 U.S.C. § 1053(a). (Complaint ¶¶ 35, 36.)

10. Plaintiffs' third cause of action fails to state a claim first because the Plan is alleged to be overfunded and thus any use of assets attributable to employee contributions to meet a funding obligation of Hughes cannot exist. Second, the Ninth Circuit Court of Appeals has found that "nothing in ERISA prohibits 'a plan providing for forfeiture of benefits when the affected benefits are in excess of the minimum vesting

requirements of 29 U.S.C. § 1053.'" *Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446, 450 (9th Cir. 1980) (*quoting Hepple v. Roberts & Dybdahl, Inc.*, 622 F.2d 962, 965 (8th Cir. 1980)). Because the Plan has excess assets, no forfeiture of accrued benefits can have occurred.

11. Moreover, any accrued benefits claimed by plaintiffs cannot be forfeited until the Plan is terminated and surplus assets attributable to employee contributions are not properly paid to participants. That has not happened, and the Plan expressly provides that accrued benefits will be available to each contributory participant. *See* Section 3.4-A of the amended Plan.

12. Plaintiffs' fourth cause of action alleges that the contributory plan was terminated in January 1991 when Hughes created a new non-contributory benefits structure and that, therefore, the excess assets attributable to employee contributions are to be distributed pursuant to ERISA Section 4404, 29 U.S.C. § 1344. (Complaint ¶ 42.)

13. Creation of a new benefits schedule or structure does not terminate a plan, and this claim fails on that ground alone. Indeed, plan terminations must be accomplished pursuant to the rules specified in 29 U.S.C. § 1341, and there is no allegation by plaintiffs that such a procedure has been instituted. Further, plaintiffs' argument overlooks the fact that thousands of participants, including thousands of active employees, have elected to remain under the contributory benefits structure and are continuing to receive benefits thereunder. Thus, absent a complete Plan termination, which cannot have occurred, plaintiffs are not entitled to recover surplus plan assets. *Chait v. Bernstein*, 835 F.2d 1017, 1021 (3rd Cir. 1987).

14. The wasting trust analysis utilized in *In re Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991) is not applicable here. Here there are thousands of active contributory participants in the Plan, the right to elect the contributory benefits structure was not eliminated 20 years ago,

the Plan provides for reversion to the employer and the purposes of the Plan have not been fulfilled.

15. Plaintiffs' fifth cause of action again alleges a breach of fiduciary duty, but in this instance plaintiffs contend that "defendants intend to divert assets of the Plan to pay benefits to participants of the new non-contributory plan who are not participants in the Plan," thereby violating their fiduciary duty. (Complaint ¶ 49.)

16. As the allegations are insufficient to establish that a new plan has been created, Plan assets cannot have been unlawfully diverted. In any event, the allegation is insufficient to state a claim because, to violate ERISA Section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D), the transfer of assets would have to be from the plan to a party in interest. Here the assets are simply being used to provide benefits under the Plan. Moreover, even if assets were being "transferred" from a contributory plan to a non-contributory plan, an employer's "transfer of funds" from one pension account to another does not implicate ERISA's fiduciary provisions. *Holliday v. Xerox Corp.*, 732 F.2d 548, 551 (6th Cir.), *cert. denied*, 469 U.S. 917 (1984). As the court in *Lynch v. J.P. Stevens & Co.*, 758 F. Supp. 976 (D.N.J. 1988), stated:

> The defendants did not breach their fiduciary duties to be loyal to plan participants and to act for their exclusive benefit by managing the plan in such a way as ultimately proved profitable. It defies the purposes of ERISA to hold that employers should be penalized for managing a plan in a way best calculated to assure its continued financial viability. That such management or investment strategies have the incidental benefit to an employer of reducing its contributions does not alter this.

758 F. Supp. at 1008.

17. *Cutaiar v. Marshall*, 590 F.2d 523 (3rd Cir. 1979) is not apposite. A plan amendment to establish a new non-

contributory benefits structure does not terminate the plan. *See* Treasury Regulation § 1.414(l)-1(b)(1), 26 CFR § 1.414(l)-1(b)(1).

18. *Cutaiar*'s prohibited transaction analysis is inapplicable because there has been no "transaction," no separate benefit plans and no knowing acts by fiduciaries to enter into an imaginary transaction in any event. Moreover, nothing in ERISA prohibits two different benefit programs from being funded from one funding source. *See, e.g.*, ERISA Section 3(3), 29 U.S.C. § 1002(3).

19. Plaintiffs' sixth cause of action alleges that defendants violated the terms of the Plan by providing early retirement benefits in a discriminatory manner. Plaintiffs allege that in 1989 Hughes amended the Plan to create an "Operational Transition Plan" ("OTP") which provided significant additional retirement benefits to certain eligible employees. The purpose of the OTP was to induce employees to elect early retirement. (Complaint ¶ 26.) Plaintiffs assert further that fiduciaries must carry out their fiduciary duties in accordance with the Plan documents and that the Plan provides for equitable and fair administration. (Complaint ¶¶ 52, 54.) That has not occurred, plaintiffs contend, because the benefits were made available "only to certain participants who were active employees of Hughes at the time of the adoption of the OTP Amendment and not to existing retirees and certain other Plan participants." (Complaint ¶ 55.)

20. Plaintiffs' sixth cause of action fails to state a claim because an employer designing an early retirement window program is acting as the plan creator, not as a fiduciary administering the plan. *Belade v. ITT Corp.*, 909 F.2d 736 (2d Cir. 1990); *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988). Plaintiffs' reference to the general Plan language for equitable treatment, and the alleged fiduciary obligation to follow it, adds nothing. Were it not so, a plan could never be amended to provide

different benefits for different participants, and such is simply not the case under ERISA.

Based on the foregoing findings, the Court hereby orders that defendants' motion to dismiss the entire complaint, and each cause of action therein, is granted without leave to plaintiffs to amend, that the entire action is dismissed on the merits with prejudice, that defendants' motion for a more definite statement is deemed moot, and that defendants' motion to strike is deemed moot.

DATED: 2-9, 1993

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN and RICHARD E. HOOK,

Plaintiffs,

v.

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Defendants.

CASE NO. CV-92-4020-RG (Bx)

JUDGMENT

This cause came on for hearing on December 14, 1992, before the Honorable Richard A. Gadbois, Jr., United States District Judge, presiding, and the issues having been duly heard and an order of dismissal of action having been duly rendered this same date,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the complaint herein and each cause of action therein be dismissed without leave to amend, that the entire action be and hereby is dismissed on the merits with prejudice.

DATED: 2-9, 1993

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F
PERTINENT STATUTORY PROVISIONS

29 U.S.C. § 1002. Definitions

For purposes of this subchapter:

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(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

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(23) The term "accrued benefit" means—

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

The accrued benefit of an employee shall not be less than the amount determined under section 1054(c)(2)(B) of this title with respect to the employees accumulated contribution.

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29 U.S.C. § 1053. Minimum vesting standards

(a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A) or (B).

(A) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee has a nonforfeitable right to

a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

Years of service:	The nonforfeitable percentage is:
3	20
4	40
5	60
6	80
7 or more	100.

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of this title).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multi-employer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely

because plan amendments may be given retroactive application as provided in section 1082(c)(8) of this title.

(D)(i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 1054(c)(2)(C) of this title) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 1054(c)(2)(C) of this title (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). The plan provision required under this clause may provide that such repayment must be made (I) in the case of a withdrawal on account of separation from service, before the earlier of 5 years after the first date on which the participant is subsequently re-employed by the employer, or the close of the first period of 5 consecutive 1-year breaks in service commencing after the withdrawal; or (II) in the case of any other withdrawal, 5 years after the date of the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the

participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

(v) Cross reference.—

For nonforfeitability where the employee has a nonforfeitable right to at least 50 percent of his accrued benefit, see section 1056(c) of this title.

(E)(i) A right to an accrued benefit derived from employer contributions under a multi-employer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.

(ii) A participant's right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because—

(I) the plan is amended to reduce benefits under section 1425 or 1441 of this title, or

(II) benefit payments under the plan may be suspended under section 1426 or 1441 of this title.

(F) A matching contribution (within the meaning of section 401(m) of title 26 shall not be treated as forfeitable merely because such contribution is forfeitable if the contribution to which the matching contribution relates is

treated as an excess contribution under section 401(k)(8)(B) of title 26, an excess deferral under section 402(g)(2)(A) of title 26, or an excess aggregate contribution under section 401(m)(6)(B) of title 26.

(b) Computation of period of service

(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:

(A) years of service before age 18,[1]

(B) years of service during a period for which the employee declined to contribute to a plan requiring employee contributions,[1]

(C) years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan, defined by the Secretary of the Treasury;

(D) service not required to be taken into account under paragraph (3);

(E) years of service before January 1, 1971, unless the employee has had at least 3 years of service after December 31, 1970;

(F) years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date; and

(G) in the case of a multiemployer plan, years of service—

(i) with an employer after—

[1] So in original. The comma probably should be a semi-colon.

(I) a complete withdrawal of such employer from the plan (within the meaning of section 1383 of this title), or

(II) to the extent permitted by regulations prescribed by the Secretary of the Treasury, a partial withdrawal described in section 1385(b)(2)(A)(i) of this title in connection with the decertification of the collective bargaining representative; and

(ii) with any employer under the plan after the termination date of the plan under section 1348 of this title.

(2)(A) For purposes of this section, except as provided in subparagraph (C), the term "year of service" means a calendar year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has completed 1,000 hours of service.

(B) For purposes of this section, the term "hour of service" has the meaning provided by section 1052(a)(3)(C) of this title.

(C) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of service" shall be such period as determined under regulations of the Secretary.

(D) For purposes of this section, in the case of any maritime industry, 125 days of service shall be treated as 1,000 hours of service. The Secretary may prescribe regulations to carry out the purposes of this subparagraph.

(3)(A) For purposes of this paragraph, the term "1-year break in service" means a calendar year, plan year, or other 12-consecutive-month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has not completed more than 500 hours of service.

(B) For purposes of paragraph (1), in the case of any employee who has any 1-year break in service, years of service before such break shall not be required to be taken into account until he has completed a year of service after his return.

(C) For purposes of paragraph (1), in the case of any participant in an individual account plan or an insured defined benefit plan which satisfies the requirements of subsection 1054(b)(1)(F) of this title who has 5 consecutive 1-year breaks in service, years of service after such 5-year period shall not be required to be taken into account for purposes of determining the nonforfeitable percentage of his accrued benefit derived from employer contributions which accrued before such 5-year period.

(D)(i) For purposes of paragraph (1), in the case of a nonvested participant, years of service with the employer or employers maintaining the plan before any period of consecutive 1-year breaks in service shall not be required to be taken into account if the number of consecutive 1-year breaks in service within such period equals or exceeds the greater of—

(I) 5, or

(II) the aggregate number of years of service before such period.

(ii) If any years of service are not required to be taken into account by reason of a period of breaks in service to which clause (i) applies, such years of service shall not be taken into account in applying clause (i) to a subsequent period of breaks in service.

(iii) For purposes of clause (i), the term "nonvested participant" means a participant who does not have any nonforfeitable right under the plan to an accrued benefit derived from employer contributions.

(E)(i) In the case of each individual who is absent from work for any period—

(I) by reason of the pregnancy of the individual,

(II) by reason of the birth of a child of the individual,

(III) by reason of the placement of a child with the individual in connection with the adoption of such child by such individual, or

(IV) for purposes of caring for such child for a period beginning immediately following such birth or placement,

the plan shall treat as hours of service, solely for purposes of determining under this paragraph whether a 1-year break in service has occurred, the hours described in clause (ii).

(ii) The hours described in this clause are—

(I) the hours of service which otherwise would normally have been credited to such individual but for such absence, or

(II) in any case in which the plan is unable to determine the hours described in subclause (I), 8 hours of service per day of absence,

except that the total number of hours treated as hours of service under this clause by reason of such pregnancy or placement shall not exceed 501 hours.

(iii) The hours described in clause (ii) shall be treated as hours of service as provided in this subparagraph—

(I) only in the year in which the absence from work begins, if a participant would be prevented from incurring a 1-year break in service in such year solely because the period of absence is treated as hours of service as provided in clause (i); or

(II) in any other case, in the immediately following year.

(iv) For purposes of this subparagraph, the term "year" means the period used in computations pursuant to paragraph (2).

(v) A plan may provide that no credit will be given pursuant to this subparagraph unless the individual furnishes to the plan

administrator such timely information as the plan may reasonably require to establish—

(I) that the absence from work is for reasons referred to in clause (i), and

(II) the number of days for which there was such an absence.

(4) Cross references.—

(A) For definitions of "accrued benefit" and "normal retirement age", see sections 1002(23) and (24) of this title;

(B) For effect of certain cash out distributions, see section 1054(d)(1) of this title.

(c) Plan amendments altering vesting schedule

(1)(A) A plan amendment changing any vesting schedule under this plan shall be treated as not satisfying the requirements of subsection (a)(2) of this section if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment.

(B) A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) of this section unless each participant having not less than 3 years of service is permitted to elect, within a reasonable period after adoption of such amendment, to have his nonforfeitable percentage computed under the plan without regard to such amendment.

(2) Subsection (a) of this section shall not apply to benefits which may not be provided for designated employees in the event of early termination of the plan under provisions of the plan adopted pursuant to regulations prescribed by the Secretary of the Treasury to preclude the discrimination prohibited by section 401(a)(4) of title 26.

(d) Nonforfeitable benefits after lesser period and in greater amounts than required

A pension plan may allow for nonforfeitable benefits after a lesser period and in greater amounts than are required by this part.

(e) Consent for distribution; present value; covered distributions

(1) If the present value of any nonforfeitable benefit with respect to a participant in a plan exceeds $5,000, the plan shall provide that such benefit may not be immediately distributed without the consent of the participant.

(2) For purposes of paragraph (1), the present value shall be calculated in accordance with section 1055(g)(3) of this title.

(3) This subsection shall not apply to any distribution of dividends to which section 404(k) of title 26 applies.

29 U.S.C. § 1054. Benefit accrual requirements

(a) Satisfaction of requirements by pension plans

Each pension plan shall satisfy the requirements of subsection (b)(3) of this section, and—

(1) in the case of a defined benefit plan, shall satisfy the requirements of subsection (b)(1) of this section; and

(2) in the case of a defined contribution plan, shall satisfy the requirements of subsection (b)(2) of this section.

(b) Enumeration of plan requirements

(1)(A) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which each participant is entitled upon his separation from the service is not less than—

(i) 3 percent of the normal retirement benefit to which he would be entitled at the normal retirement age if he commenced participation at the earliest possible entry age

under the plan and served continuously until the earlier of age 65 or the normal retirement age specified under the plan, multiplied by

(ii) the number of years (not in excess of 33 1/3) of his participation in the plan.

In the case of a plan providing retirement benefits based on compensation during any period, the normal retirement benefit to which a participant would be entitled shall be determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years of service, not in excess of 10, for which his compensation was the highest. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(B) A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph—

(i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;

(ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

(C) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(D) Subparagraphs (A), (B), and (C) shall not apply with respect to years of participation before the first plan year to which this section applies but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of—

(i) his accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974, or

(ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have

been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

(E) Notwithstanding subparagraphs (A), (B), and (C) of this paragraph, a plan shall not be treated as not satisfying the requirements of this paragraph solely because the accrual of benefits under the plan does not become effective until the employee has two continuous years of service. For purposes of this subparagraph, the term "year of service" has the meaning provided by section 1052(a)(3)(A) of this title.

(F) Notwithstanding subparagraphs (A), (B), and (C), a defined benefit plan satisfies the requirements of this paragraph if such plan

(i) is funded exclusively by the purchase of insurance contracts, and

(ii) satisfies the requirements of paragraphs (2) and (3) of section 1081(b) of this title (relating to certain insurance contract plans),

but only if an employee's accrued benefit as of any applicable date is not less than the cash surrender value his insurance contracts would have on such applicable date if the requirements of paragraphs (4), (5), and (6) of section 1081(b) of this title were satisfied.

(G) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if the participant's accrued benefit is reduced on account of any increase in his age or service. The preceding sentence shall not apply to benefits under the plan commencing before benefits payable under title II of the Social Security Act [42 U.S.C. 401 et seq.] which benefits under the plan—

(i) do not exceed social security benefits, and

(ii) terminate when such social security benefits commence.

(H)(i) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the

requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

(ii) A plan shall not be treated as failing to meet the requirements of this subparagraph solely because the plan imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(iii) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(I) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subparagraph for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(II) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title, then any requirement of this subparagraph for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The preceding provisions of this clause shall apply in accordance with regulations of the Secretary of the Treasury.

Such regulations may provide for the application of the preceding provisions of this clause, in the case of any such employee, with respect to any period of time within a plan year.

(iv) Clause (i) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(v) A plan shall not be treated as failing to meet the requirements of clause (i) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(vi) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 shall apply with respect to the requirements of this subparagraph in the same manner and to the same extent as such regulations apply with respect to the requirements of such section 411(b)(1)(H).

(2)(A) A defined contribution plan satisfies the requirements of this paragraph if, under the plan, allocations to the employee's account are not ceased, and the rate at which amounts are allocated to the employee's account is not reduced, because of the attainment of any age.

(B) A plan shall not be treated as failing to meet the requirements of subparagraph (A) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(C) Any regulations prescribed by the Secretary of the Treasury pursuant to subparagraphs (B) and (C) of section 411(b)(2) of title 26 shall apply with respect to the requirements of this paragraph in the same manner and to the same extent as such regulations apply with respect to the requirements of such section 411(b)(2).

(3) A plan satisfies the requirements of this paragraph if—

(A) in the case of a defined benefit plan, the plan requires separate accounting for the portion of each employee's accrued benefit derived from any voluntary employee contributions permitted under the plan; and

(B) in the case of any plan which is not a defined benefit plan, the plan requires separate accounting for each employee's accrued benefit.

(4)(A) For purposes of determining an employee's accrued benefit, the term "year of participation" means a period of service (beginning at the earliest date on which the employee is a participant in the plan and which is included in a period of service required to be taken into account under section 1052(b) of this title, determined without regard to section 1052(b)(5) of this title) as determined under regulations prescribed by the Secretary which provide for the calculation of such period on any reasonable and consistent basis.

(B) For purposes of this paragraph, except as provided in subparagraph (C), in the case of any employee whose customary employment is less than full time, the calculation of such employee's service on any basis which provides less than a ratable portion of the accrued benefit to which he would be entitled under the plan if his customary employment were full time shall not be treated as made on a reasonable and consistent basis.

(C) For purposes of this paragraph, in the case of any employee whose service is less than 1,000 hours during any calendar year, plan year or other 12- consecutive-month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) the calculation of his period of service shall not be treated as not made on a reasonable and consistent basis merely because such service is not taken into account.

(D) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of participation" shall be such period as determined under regulations prescribed by the Secretary.

(E) For purposes of this subsection in the case of any maritime industry, 125 days of service shall be treated as a year of participation. The Secretary may prescribe regulations to carry out the purposes of this subparagraph.

(c) Employee's accrued benefits derived from employer and employee contributions

(1) For purposes of this section and section 1053 of this title an employee's accrued benefit derived from employer contributions as of any applicable date is the excess (if any) of the accrued benefit for such employee as of such applicable date over the accrued benefit derived from contributions made by such employee as of such date.

(2)(A) In the case of a plan other than a defined benefit plan, the accrued benefit derived from contributions made by an employee as of any applicable date is—

(i) except as provided in clause (ii), the balance of the employee's separate account consisting only of his contributions and income, expenses, gains, and losses attributable thereto, or

(ii) if a separate account is not maintained with respect to an employee's contributions under such a plan, the amount which bears the same ratio to his total accrued benefit as the total amount of the employee's contributions (less withdrawals) bears to the sum of such contributions and the contributions made on his behalf by the employer (less withdrawals).

(B) DEFINED BENEFIT PLANS.—In the case of a defined benefit plan, the accrued benefit derived from contributions made by an employee as of any applicable date is the amount

equal to the employee's accumulated contributions expressed as an annual benefit commencing at normal retirement age, using an interest rate which would be used under the plan under section 1055(g)(3) of this title (as of the determination date).

(C) For purposes of this subsection, the term "accumulated contributions" means the total of—

(i) all mandatory contributions made by the employee,

(ii) interest (if any) under the plan to the end of the last plan year to which section 1053(a)(2) of this title does not apply (by reason of the applicable effective date), and

(iii) interest on the sum of the amounts determined under clauses (i) and (ii) compounded annually—

(I) at the rate of 120 percent of the Federal midterm rate (as in effect under section 1274 of title 26 for the 1st month of a plan year for the period beginning with the 1st plan year to which subsection (a)(2) of this section applies by reason of the applicable effective date) and ending with the date on which the determination is being made, and

(II) at the interest rate which would be used under the plan under section 1055(g)(3) of this title (as of the determination date) for the period beginning with the determination date and ending on the date on which the employee attains normal retirement age.

For purposes of this subparagraph, the term "mandatory contributions" means amounts contributed to the plan by the employee which are required as a condition of employment, as a condition of participation in such plans, or as a condition of obtaining benefits under the plan attributable to employer contributions.

(D) The Secretary of the Treasury is authorized to adjust by regulation the conversion factor described in subparagraph (B) from time to time as he may deem necessary. No such adjustment shall be effective for a plan year beginning before

the expiration of 1 year after such adjustment is determined and published.

(3) For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

(4) In the case of a defined benefit plan which permits voluntary employee contributions, the portion of an employee's accrued benefit derived from such contributions shall be treated as an accrued benefit derived from employee contributions under a plan other than a defined benefit plan.

(d) Employee service which may be disregarded in determining employee's accrued benefits under plan

Notwithstanding section 1053(b)(1) of this title, for purposes of determining the employee's accrued benefit under the plan, the plan may disregard service performed by the employee with respect to which he has received—

(1) a distribution of the present value of his entire nonforfeitable benefit if such distribution was in an amount (not more than the dollar limit under section 1053(e)(1) of this title) permitted under regulations prescribed by the Secretary of the Treasury, or

(2) a distribution of the present value of his nonforfeitable benefit attributable to such service which he elected to receive.

Paragraph (1) shall apply only if such distribution was made on termination of the employee's participation in the plan. Paragraph (2) shall apply only if such distribution was made on termination of the employee's participation in the plan or under such other circumstances as may be provided under regulations prescribed by the Secretary of the Treasury.

(e) Opportunity to repay full amount of distributions which have been reduced through disregarded employee service

For purposes of determining the employee's accrued benefit, the plan shall not disregard service as provided in subsection (d) of this section unless the plan provides an opportunity for the participant to repay the full amount of a distribution described in subsection (d) of this section with, in the case of a defined benefit plan, interest at the rate determined for purposes of subsection (c)(2)(C) of this section and provides that upon such repayment the employee's accrued benefit shall be recomputed by taking into account service so disregarded. This subsection shall apply only in the case of a participant who—

(1) received such a distribution in any plan year to which this section applies which distribution was less than the present value of his accrued benefit,

(2) resumes employment covered under the plan, and

(3) repays the full amount of such distribution with, in the case of a defined benefit plan, interest at the rate determined for purposes of subsection (c)(2)(C) of this section.

The plan provision required under this subsection may provide that such repayment must be made (A) in the case of a withdrawal on account of separation from service, before the earlier of 5 years after the first date on which the participant is subsequently re-employed by the employer, or the close of the first period of 5 consecutive 1-year breaks in service commencing after the withdrawal; or (B) in the case of any other withdrawal, 5 years after the date of the withdrawal.

(f) Employer treated as maintaining a plan

For the purposes of this part, an employer shall be treated as maintaining a plan if any employee of such employer accrues benefits under such plan by reason of service with such employer.

(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of—

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

(3) For purposes of this subsection, any—

(A) tax credit employee stock ownership plan (as defined in section 409(a) of title 26), or

(B) employee stock ownership plan (as defined in section 4975(e)(7) of title 26),

shall not be treated as failing to meet the requirements of this subsection merely because it modifies distribution options in a nondiscriminatory manner.

(h) Notice of significant reduction in benefit accruals

(1) A plan described in paragraph (2) may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to—

(A) each participant in the plan,

(B) each beneficiary who is an alternate payee (within the meaning of section 1056(d)(3)(K) of this title) under an applicable qualified domestic relations order (within the meaning of section 1056(d)(3)(B)(i) of this title), and

(C) each employee organization representing participants in the plan,

except that such notice shall instead be provided to a person designated, in writing, to receive such notice on behalf of any person referred to in subparagraph (A), (B), or (C).

(2) A plan is described in this paragraph if such plan is—

(A) a defined benefit plan, or

(B) an individual account plan which is subject to the funding standards of section 1082 of this title.

(i) Prohibition on benefit increases where plan sponsor is in bankruptcy

(1) In the case of a plan described in paragraph (3) which is maintained by an employer that is a debtor in a case under title 11 or similar Federal or State law, no amendment of the plan which increases the liabilities of the plan by reason of—

(A) any increase in benefits,

(B) any change in the accrual of benefits, or

(C) any change in the rate at which benefits become nonforfeitable under the plan,

with respect to employees of the debtor, shall be effective prior to the effective date of such employer's plan of reorganization.

(2) Paragraph (1) shall not apply to any plan amendment that—

(A) the Secretary of the Treasury determines to be reasonable and that provides for only de minimis increases in the liabilities of the plan with respect to employees of the debtor,

(B) only repeals an amendment described in section 1082(c)(8) of this title,

(C) is required as a condition of qualification under part I of subchapter D of chapter 1 of title 26, or

(D) was adopted prior to, or pursuant to a collective bargaining agreement entered into prior to, the date on which the employer became a debtor in a case under title 11 or similar Federal or State law.

(3) This subsection shall apply only to plans (other than multiemployer plans) covered under section 1321 of this title for which the funded current liability percentage (within the meaning of section 1082(d)(8) of this title) is less than 100 percent after taking into account the effect of the amendment.

(4) For purposes of this subsection, the term "employer" has the meaning set forth in section 1082(c)(11)(A) of this title, without regard to section 1082(c)(11)(B) of this title.

(j) Cross reference

For special rules relating to plan provisions adopted to preclude discrimination, see section 1053(c)(2) of this title.

29 U.S.C. § 1055. Requirement of joint and survivor annuity and preretirement survivor annuity

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(g) Distribution of present value of annuity; written consent; determination of present value

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(3) DETERMINATION OF PRESENT VALUE

(A) IN GENERAL.—

(i) PRESENT VALUE.—Except as provided in subparagraph (B), for purposes of paragraphs (1) and (2), the present value shall not be less than the present value calculated by using the applicable mortality table and the applicable interest rate.

(ii) DEFINITIONS.—For purposes of clause (i)—

(I) APPLICABLE MORTALITY TABLE.—The term "applicable mortality table" means the table prescribed by the Secretary of the Treasury. Such table shall be based on the prevailing commissioners' standard table (described in section 807(d)(5)(A) of title 26) used to determine reserves for group annuity contracts issued on the date as of which present value is being determined (without regard to any other subparagraph of section 807(d)(5) of title 26).

(II) APPLICABLE INTEREST RATE.—The term "applicable interest rate" means the annual rate of interest on 30-year Treasury securities for the month before the date of distribution or such other time as the Secretary of the Treasury may by regulations prescribe.

(B) EXCEPTION.—In the case of a distribution from a plan that was adopted and in effect prior to December 8, 1994, the present value of any distribution made before the earlier of—

(i) the later of when a plan amendment applying subparagraph (A) is adopted or made effective, or

(ii) the first day of the first plan year beginning after December 31, 1999,

shall be calculated, for purposes of paragraphs (1) and (2), using the interest rate determined under the regulations of the Pension Benefit Guaranty Corporation for determining the present value of a lump sum distribution on plan termination that were in effect on September 1, 1993, and using the provisions of the plan as in effect on the day before December 8, 1994; but only if such provisions of the plan met the requirements of this paragraph as in effect on the day before December 8, 1994.

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29 U.S.C. § 1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.

(b) Exceptions

The requirements of subsection (a) of this section shall not apply—

(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(3) to a plan—

(A) some or all of the participants of which are employees described in section 401(c)(1) of title 26; or

(B) which consists of one or more individual retirement accounts described in section 408 of title 26;

to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of title 26, whichever is applicable.

(4) to a plan which the Secretary exempts from the requirement of subsection (a) of this section and which is not subject to any of the following provisions of this chapter—

(A) part 2 of this subtitle,

(B) part 3 of this subtitle, or

(C) subchapter III of this chapter; or

(5) to a contract established and maintained under section 403(b) of title 26 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of title 26.

(6) Any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to this chapter.

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of title 26 as in effect on January 1, 1995) the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)(A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter—

(i) if such contribution or payment is made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution, and

(ii) if such contribution or payment is made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

(B) If a contribution is conditioned on initial qualification of the plan under section 401 or 403(a) of title 26, and if the plan receives an adverse determination with respect to its initial qualification, then paragraph (1) shall not prohibit the return of such contribution to the employer within one year after such determination, but only if the application for the determination is made by the time prescribed by law for filing the employer's return for the taxable year in which such plan was adopted, or such later date as the Secretary of the Treasury may prescribe.

(C) If a contribution is conditioned upon the deductibility of the contribution under section 404 of title 26, then, to the extent the deduction is disallowed, paragraph (1) shall not prohibit the return to the employer of such contribution (to the extent disallowed) within one year after the disallowance of the deduction.

(3) In the case of a withdrawal liability payment which has been determined to be an overpayment, paragraph (1) shall not prohibit the return of such payment to the employer within 6 months after the date of such determination.

(d) Termination of plan

(1) Upon termination of a pension plan to which section 1321 of this title does not apply at the time of termination and to which this part applies (other than a plan to which no employer contributions have been made) the assets of the plan shall be allocated in accordance with the provisions of section 1344 of this title, except as otherwise provided in regulations of the Secretary.

(2) The assets of a welfare plan which terminates shall be distributed in accordance with the terms of the plan, except as otherwise provided in regulations of the Secretary.

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement—

(i) under section 4980(d)(2)(B) of title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement—

(i) under section 4980(d)(2)(A) of title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection—

(A) any term used in this subsection which is also used in section 4980(d) of title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to title 26 shall be a reference to title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

29 U.S.C. § 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a

party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

29 U.S.C. § 1132. Civil enforcement

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(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

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29 U.S.C. § 1302. Pension Benefit Guaranty Corporation

(a) Establishment within Department of Labor

There is established within the Department of Labor a body corporate to be known as the Pension Benefit Guaranty Corporation. In carrying out its functions under this subchapter, the corporation shall be administered by the chairman of the board of directors in accordance with policies established by the board. The purposes of this subchapter, which are to be carried out by the corporation, are—

(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,

(2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and

(3) to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out its obligations under this subchapter.

(b) Powers of corporation

To carry out the purposes of this subchapter, the corporation has the powers conferred on a nonprofit corporation under the District of Columbia Nonprofit Corporation Act [D.C.Code, § 29-501 et seq.] and, in addition to any specific power granted to the corporation elsewhere in this subchapter or under that Act, the corporation has the power—

(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal;

(2) to adopt, alter, and use a corporate seal, which shall be judicially noticed;

(3) to adopt, amend, and repeal, by the board of directors, bylaws, rules, and regulations relating to the conduct of its business and the exercise of all other rights and powers granted to it by this chapter and such other bylaws, rules, and regulations as may be necessary to carry out the purposes of this subchapter;

(4) to conduct its business (including the carrying on of operations and the maintenance of offices) and to exercise all other rights and powers granted to it by this chapter in any State or other jurisdiction without regard to qualification, licensing, or other requirements imposed by law in such State or other jurisdiction;

(5) to lease, purchase, accept gifts or donations of, or otherwise to acquire, to own, hold, improve, use, or otherwise deal in or with, and to sell, convey, mortgage, pledge, lease, exchange, or otherwise dispose of, any property, real, personal, or mixed, or any interest therein wherever situated;

(6) to appoint and fix the compensation of such officers, attorneys, employees, and agents as may be required, to determine their qualifications, to define their duties, and, to the extent desired by the corporation, require bonds for them and fix the penalty thereof, and to appoint and fix the compensation of experts and consultants in accordance with the provisions of section 3109 of title 5;

(7) to utilize the personnel and facilities of any other agency or department of the United States Government, with or without reimbursement, with the consent of the head of such agency or department; and

(8) to enter into contracts, to execute instruments, to incur liabilities, and to do any and all other acts and things as may be necessary or incidental to the conduct of its business and the exercise of all other rights and powers granted to the corporation by this chapter.

* * * *

29 U.S.C. § 1341. Termination of single-employer plans

(a) General rules governing single-employer plan terminations

(1) Exclusive means of plan termination

Except in the case of a termination for which proceedings are otherwise instituted by the corporation as provided in section 1342 of this title, a single-employer plan may be terminated only in a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section.

(2) 60-day notice of intent to terminate

Not less than 60 days before the proposed termination date of a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section, the plan administrator shall provide to each affected party (other than the corporation in the case of a standard termination) a written notice of intent to terminate stating that such termination is intended and the proposed termination date. The written notice shall include any related additional information required in regulations of the corporation.

(3) Adherence to collective bargaining agreements

The corporation shall not proceed with a termination of a plan under this section if the termination would violate the terms and conditions of an existing collective bargaining agreement. Nothing in the preceding sentence shall be construed as limiting the authority of the corporation to institute proceedings to involuntarily terminate a plan under section 1342 of this title.

(b) Standard termination of single-employer plans

(1) General requirements

A single-employer plan may terminate under a standard termination only if—

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parties required under subsection (a)(2) of this section,

(B) the requirements of subparagraphs (A) and (B) of paragraph (2) are met,

(C) the corporation does not issue a notice of noncompliance under subparagraph (C) of paragraph (2), and

(D) when the final distribution of assets occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(2) Termination procedure

(A) Notice to the corporation

As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2) of this section, the plan administrator shall send a notice to the corporation setting forth—

(i) certification by an enrolled actuary—

(I) of the projected amount of the assets of the plan (as of a proposed date of final distribution of assets),

(II) of the actuarial present value (as of such date) of the benefit liabilities (determined as of the proposed termination date) under the plan, and

(III) that the plan is projected to be sufficient (as of such proposed date of final distribution) for such benefit liabilities,

(ii) such information as the corporation may prescribe in regulations as necessary to enable the corporation to make determinations under subparagraph (C), and

(iii) certification by the plan administrator that—

(I) the information on which the enrolled actuary based the certification under clause (i) is accurate and complete, and

(II) the information provided to the corporation under clause (ii) is accurate and complete.

Clause (i) and clause (iii)(I) shall not apply to a plan described in section 412(i) of title 26.

(B) Notice to participants and beneficiaries of benefit commitments[1]

No later than the date on which a notice is sent by the plan administrator under subparagraph (A), the plan administrator shall send a notice to each person who is a participant or beneficiary under the plan—

(i) specifying the amount of the benefit liabilities (if any) attributable to such person as of the proposed termination date and the benefit form on the basis of which such amount is determined, and

(ii) including the following information used in determining such benefit liabilities:

(I) the length of service,

(II) the age of the participant or beneficiary,

(III) wages,

(IV) the assumptions, including the interest rate, and

(V) such other information as the corporation may require.

Such notice shall be written in such manner as is likely to be understood by the participant or beneficiary and as may be prescribed in regulations of the corporation.

(C) Notice from corporation of noncompliance

(i) In general

Within 60 days after receipt of the notice under subparagraph (A), the corporation shall issue a notice of noncompliance to the plan administrator if—

(I) it determines, based on the notice sent under paragraph (2)(A) of subsection (b) of this section, that

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[1] So in original. Probably should be "benefit liabilities".

there is reason to believe that the plan is not sufficient for benefit liabilities,

(II) it otherwise determines, on the basis of information provided by affected parties or otherwise obtained by the corporation, that there is reason to believe that the plan is not sufficient for benefit liabilities, or

(III) it determines that any other requirement of subparagraph (A) or (B) of this paragraph or of subsection (a)(2) of this section has not been met, unless it further determines that the issuance of such notice would be inconsistent with the interests of participants and beneficiaries.

(ii) Extension

The corporation and the plan administrator may agree to extend the 60-day period referred to in clause (i) by a written agreement signed by the corporation and the plan administrator before the expiration of the 60-day period. The 60-day period shall be extended as provided in the agreement and may be further extended by subsequent written agreements signed by the corporation and the plan administrator made before the expiration of a previously agreed upon extension of the 60-day period. Any extension may be made upon such terms and conditions (including the payment of benefits) as are agreed upon by the corporation and the plan administrator.

(D) Final distribution of assets in absence of notice of noncompliance

The plan administrator shall commence the final distribution of assets pursuant to the standard termination of the plan as soon as practicable after the expiration of the 60-day (or extended) period referred to in subparagraph (C), but such final distribution may occur only if—

(i) the plan administrator has not received during such period a notice of noncompliance from the corporation under subparagraph (C), and

(ii) when such final distribution occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(3) Methods of final distribution of assets

(A) In general

In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan administrator shall distribute the assets in accordance with section 1344 of this title. In distributing such assets, the plan administrator shall—

(i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or

(ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan. A transfer of assets to the corporation in accordance with section 1350 of this title on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

(B) Certification to corporation of final distribution of assets

Within 30 days after the final distribution of assets is completed pursuant to the standard termination of the plan under this subsection, the plan administrator shall send a notice to the corporation certifying that the assets of the plan have been distributed in accordance with the provisions of subparagraph (A) so as to pay all benefit liabilities under the plan.

(4) Continuing authority

Nothing in this section shall be construed to preclude the continued exercise by the corporation, after the termination

date of a plan terminated in a standard termination under this subsection, of its authority under section 1303 of this title with respect to matters relating to the termination. A certification under paragraph (3)(B) shall not affect the corporation's obligations under section 1322 of this title.

(c) Distress termination of single-employer plans

(1) In general

A single-employer plan may terminate under a distress termination only if—

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parties required under subsection (a)(2) of this section,

(B) the requirements of subparagraph (A) of paragraph (2) are met, and

(C) the corporation determines that the requirements of subparagraph (B) of paragraph (2) are met.

(2) Termination requirements

(A) Information submitted to the corporation

As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2) of this section, the plan administrator shall provide the corporation, in such form as may be prescribed by the corporation in regulations, the following information:

(i) such information as the corporation may prescribe by regulation as necessary to make determinations under subparagraph (B) and paragraph (3);

(ii) unless the corporation determines the information is not necessary for purposes of paragraph (3)(A) or section 1362 of this title, certification by an enrolled actuary of—

(I) the amount (as of the proposed termination date and, if applicable, the proposed distribution date) of the current value of the assets of the plan,

(II) the actuarial present value (as of such dates) of the benefit liabilities under the plan,

(III) whether the plan is sufficient for benefit liabilities as of such dates,

(IV) the actuarial present value (as of such dates) of benefits under the plan guaranteed under section 1322 of this title, and

(V) whether the plan is sufficient for guaranteed benefits as of such dates;

(iii) in any case in which the plan is not sufficient for benefit liabilities as of such date—

(I) the name and address of each participant and beneficiary under the plan as of such date, and

(II) such other information as shall be prescribed by the corporation by regulation as necessary to enable the corporation to be able to make payments to participants and beneficiaries as required under section 1322(c) of this title; and

(iv) certification by the plan administrator that—

(I) the information on which the enrolled actuary based the certifications under clause (ii) is accurate and complete, and

(II) the information provided to the corporation under clauses (i) and (iii) is accurate and complete.

Clause (ii) and clause (iv)(I) shall not apply to a plan described in section 412(i) of title 26.

(B) Determination by corporation of necessary distress criteria

Upon receipt of the notice of intent to terminate required under subsection (a)(2) of this section and the information required under subparagraph (A), the corporation shall determine whether the requirements of this subparagraph are met as provided in clause (i), (ii), or (iii). The requirements of this subparagraph are met if each person who is (as of the proposed termination date) a contributing sponsor of such plan or a member of such sponsor's controlled group meets the requirements of any of the following clauses:

(i) Liquidation in bankruptcy or insolvency proceedings

The requirements of this clause are met by a person if—

(I) such person has filed or has had filed against such person, as of the proposed termination date, a petition seeking liquidation in a case under title 11, or under any similar Federal law or law of a State or political subdivision of a State (or a case described in clause (ii) filed by or against such person has been converted, as of such date, to a case in which liquidation is sought), and

(II) such case has not, as of the proposed termination date, been dismissed.

(ii) Reorganization in bankruptcy or insolvency proceedings

The requirements of this clause are met by a person if—

(I) such person has filed, or has had filed against such person, as of the proposed termination date, a petition seeking reorganization in a case under Title 11, or under any similar law of a State or political subdivision of a State (or a case described in clause (i) filed by or against such person has been converted, as of such date, to such a case in which reorganization is sought),

(II) such case has not, as of the proposed termination date, been dismissed,

(III) such person timely submits to the corporation any request for the approval of the bankruptcy court (or other appropriate court in a case under such similar law of a State or political subdivision) of the plan termination, and

(IV) the bankruptcy court (or such other appropriate court) determines that, unless the plan is terminated, such person will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process and approves the termination.

(iii) Termination required to enable payment of debts while staying in business or to avoid unreasonably burdensome pension costs caused by declining workforce

The requirements of this clause are met by a person if such person demonstrates to the satisfaction of the corporation that—

(I) unless a distress termination occurs, such person will be unable to pay such person's debts when due and will be unable to continue in business, or

(II) the costs of providing pension coverage have become unreasonably burdensome to such person, solely as a result of a decline of such person's workforce covered as participants under all single-employer plans of which such person is a contributing sponsor.

(C) Notification of determinations by the corporation

The corporation shall notify the plan administrator as soon as practicable of its determinations made pursuant to subparagraph (B).

(3) Termination procedure

(A) Determinations by corporation relating to plan sufficiency for guaranteed benefits and for benefit liabilities

If the corporation determines that the requirements for a distress termination set forth in paragraphs (1) and (2) are met, the corporation shall—

(i) determine that the plan is sufficient for guaranteed benefits (as of the termination date) or that the corporation is unable to make such determination on the basis of information made available to the corporation,

(ii) determine that the plan is sufficient for benefit liabilities (as of the termination date) or that the corporation is unable to make such determination on the basis of information made available to the corporation, and

(iii) notify the plan administrator of the determinations made pursuant to this subparagraph as soon as practicable.

(B) Implementation of termination

After the corporation notifies the plan administrator of its determinations under subparagraph (A), the termination of the plan shall be carried out as soon as practicable, as provided in clause (i), (ii), or (iii).

(i) Cases of sufficiency for benefit liabilities

In any case in which the corporation determines that the plan is sufficient for benefit liabilities, the plan administrator shall proceed to distribute the plan's assets,

and make certification to the corporation with respect to such distribution, in the manner described in subsection (b)(3) of this section, and shall take such other actions as may be appropriate to carry out the termination of the plan.

(ii) Cases of sufficiency for guaranteed benefits without a finding of sufficiency for benefit liabilities

In any case in which the corporation determines that the plan is sufficient for guaranteed benefits, but further determines that it is unable to determine that the plan is sufficient for benefit liabilities on the basis of the information made available to it, the plan administrator shall proceed to distribute the plan's assets in the manner described in subsection (b)(3) of this section, make certification to the corporation that the distribution has occurred, and take such actions as may be appropriate to carry out the termination of the plan.

(iii) Cases without any finding of sufficiency

In any case in which the corporation determines that it is unable to determine that the plan is sufficient for guaranteed benefits on the basis of the information made available to it, the corporation shall commence proceedings in accordance with section 1342 of this title.

(C) Finding after authorized commencement of termination that plan is unable to pay benefits

(i) Finding with respect to benefit liabilities which are not guaranteed benefits

If, after the plan administrator has begun to terminate the plan as authorized under subparagraph (B)(i), the plan administrator finds that the plan is unable, or will be unable, to pay benefit liabilities which are not benefits guaranteed by the corporation under section 1322 of this

title, the plan administrator shall notify the corporation of such finding as soon as practicable thereafter.

(ii) Finding with respect to guaranteed benefits

If, after the plan administrator has begun to terminate the plan as authorized by subparagraph (B)(i) or (ii), the plan administrator finds that the plan is unable, or will be unable, to pay all benefits under the plan which are guaranteed by the corporation under section 1322 of this title, the plan administrator shall notify the corporation of such finding as soon as practicable thereafter. If the corporation concurs in the finding of the plan administrator (or the corporation itself makes such a finding), the corporation shall institute appropriate proceedings under section 1342 of this title.

(D) Administration of the plan during interim period

(i) In general

The plan administrator shall—

(I) meet the requirements of clause (ii) for the period commencing on the date on which the plan administrator provides a notice of distress termination to the corporation under subsection (a)(2) of this section and ending on the date on which the plan administrator receives notification from the corporation of its determinations under subparagraph (A), and

(II) meet the requirements of clause (ii) commencing on the date on which the plan administrator or the corporation makes a finding under subparagraph (C)(ii).

(ii) Requirements

The requirements of this clause are met by the plan administrator if the plan administrator—

(I) refrains from distributing assets or taking any other actions to carry out the proposed termination under this subsection,

(II) pays benefits attributable to employer contributions, other than death benefits, only in the form of an annuity,

(III) does not use plan assets to purchase irrevocable commitments to provide benefits from an insurer, and

(IV) continues to pay all benefit liabilities under the plan, but, commencing on the proposed termination date, limits the payment of benefits under the plan to those benefits which are guaranteed by the corporation under section 1322 of this title or to which assets are required to be allocated under section 1344 of this title.

In the event the plan administrator is later determined not to have met the requirements for distress termination, any benefits which are not paid solely by reason of compliance with subclause (IV) shall be due and payable immediately (together with interest, at a reasonable rate, in accordance with regulations of the corporation).

(d) Sufficiency

For purposes of this section—

(1) Sufficiency for benefit liabilities

A single-employer plan is sufficient for benefit liabilities if there is no amount of unfunded benefit liabilities under the plan.

(2) Sufficiency for guaranteed benefits

A single-employer plan is sufficient for guaranteed benefits if there is no amount of unfunded guaranteed benefits under the plan.

(e) Limitation on conversion of a defined benefit plan to defined contribution plan.

The adoption of an amendment to a plan which causes the plan to become a plan described in section 1321(b)(1) of this title constitutes a termination of the plan. Such an amendment may take effect only after the plan satisfies the requirements for standard termination under subsection (b) of this section or distress termination under subsection (c) of this section.

29 U.S.C. § 1342. Institution of termination proceedings by the corporation

(a) Authority to institute proceedings to terminate a plan

The corporation may institute proceedings under this section to terminate a plan whenever it determines that—

(1) the plan has not met the minimum funding standard required under section 412 of title 26, or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of title 26 has been mailed with respect to the tax imposed under section 4971(a) of title 26,

(2) the plan will be unable to pay benefits when due,

(3) the reportable event described in section 1343(c)(7) of this title has occurred, or

(4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated. The corporation shall as soon as practicable institute proceedings under this section to terminate a single-employer plan whenever the corporation determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan.

The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and

beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c) of this section). Notwithstanding any other provision of this subchapter, the corporation is authorized to pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as it determines to be appropriate in the administration of this subchapter.

(b) Appointment of trustee

(1) Whenever the corporation makes a determination under subsection (a) of this section with respect to a plan or is required under subsection (a) of this section to institute proceedings under this section, it may, upon notice to the plan, apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c) of this section ordering the termination of the plan. If within 3 business days after the filing of an application under this subsection, or such other period as the court may order, the administrator of the plan consents to the appointment of a trustee, or fails to show why a trustee should not be appointed, the court may grant the application and appoint a trustee to administer the plan in accordance with its terms until the corporation determines that the plan should be terminated or that termination is unnecessary. The corporation may request that it be appointed as trustee of a plan in any case.

(2) Notwithstanding any other provision of this subchapter—

(A) upon the petition of a plan administrator or the corporation, the appropriate United States district court may appoint a trustee in accordance with the provisions of this section if the interests of the plan participants would be better served by the appointment of the trustee, and

(B) upon the petition of the corporation, the appropriate United States district court shall appoint a trustee proposed by the corporation for a multiemployer plan which is in reorganization or to which section 1341a(d) of this title applies, unless such appointment would be adverse to the interests of the plan participants and beneficiaries in the aggregate.

(3) The corporation and plan administrator may agree to the appointment of a trustee without proceeding in accordance with the requirements of paragraphs (1) and (2).

(c) Adjudication that plan must be terminated

If the corporation is required under subsection (a) of this section to commence proceedings under this section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that the plan should be terminated, it may, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund. If the trustee appointed under subsection (b) of this section disagrees with the determination of the corporation under the preceding sentence he may intervene in the proceeding relating to the application for the decree, or make application for such decree himself. Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) of this section (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle. If the corporation and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection (other than this sentence) the trustee shall have the power described in subsection (d)(1) of this section and, in

addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3) of this section. Whenever a trustee appointed under this subchapter is operating a plan with discretion as to the date upon which final distribution of the assets is to be commenced, the trustee shall notify the corporation at least 10 days before the date on which he proposes to commence such distribution.

(3)[1] In the case of a proceeding initiated under this section, the plan administrator shall provide the corporation, upon the request of the corporation, the information described in clauses (ii), (iii), and (iv) of section 1341(c)(2)(A) of this title.

(d) Powers of trustee

(1)(A) A trustee appointed under subsection (b) of this section shall have the power—

(i) to do any act authorized by the plan or this subchapter to be done by the plan administrator or any trustee of the plan;

(ii) to require the transfer of all (or any part) of the assets and records of the plan to himself as trustee;

(iii) to invest any assets of the plan which he holds in accordance with the provisions of the plan, regulations of the corporation, and applicable rules of law;

(iv) to limit payment of benefits under the plan to basic benefits or to continue payment of some or all of the benefits which were being paid prior to his appointment;

(v) in the case of a multiemployer plan, to reduce benefits or suspend benefit payments under the plan, give appropriate notices, amend the plan, and perform other acts required or

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[1] So in original. No pars. (1) and (2) have been designated.

authorized by subtitle (E) of this subchapter to be performed by the plan sponsor or administrator;

(vi) to do such other acts as he deems necessary to continue operation of the plan without increasing the potential liability of the corporation, if such acts may be done under the provisions of the plan; and

(vii) to require the plan sponsor, the plan administrator, any contributing or withdrawn employer, and any employee organization representing plan participants to furnish any information with respect to the plan which the trustee may reasonably need in order to administer the plan.

If the court to which application is made under subsection (c) of this section dismisses the application with prejudice, or if the corporation fails to apply for a decree under subsection (c) of this section, within 30 days after the date on which the trustee is appointed under subsection (b) of this section, the trustee shall transfer all assets and records of the plan held by him to the plan administrator within 3 business days after such dismissal or the expiration of such 30-day period, and shall not be liable to the plan or any other person for his acts as trustee except for willful misconduct, or for conduct in violation of the provisions of part 4 of subtitle B of subchapter I of this chapter (except as provided in subsection (d)(1)(A)(v) of this section). The 30-day period referred to in this subparagraph may be extended as provided by agreement between the plan administrator and the corporation or by court order obtained by the corporation.

(B) If the court to which an application is made under subsection (c) of this section issues the decree requested in such application, in addition to the powers described in subparagraph (A), the trustee shall have the power—

(i) to pay benefits under the plan in accordance with the requirements of this subchapter;

(ii) to collect for the plan any amounts due the plan, including but not limited to the power to collect from the

persons obligated to meet the requirements of section 1082 of this title or the terms of the plan;

(iii) to receive any payment made by the corporation to the plan under this subchapter;

(iv) to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan;

(v) to issue, publish, or file such notices, statements, and reports as may be required by the corporation or any order of the court;

(vi) to liquidate the plan assets;

(vii) to recover payments under section 1345(a) of this title; and

(viii) to do such other acts as may be necessary to comply with this subchapter or any order of the court and to protect the interests of plan participants and beneficiaries.

(2) As soon as practicable after his appointment, the trustee shall give notice to interested parties of the institution of proceedings under this subchapter to determine whether the plan should be terminated or to terminate the plan, whichever is applicable. For purposes of this paragraph, the term "interested party" means—

(A) the plan administrator,

(B) each participant in the plan and each beneficiary of a deceased participant,

(C) each employer who may be subject to liability under section 1362, 1363, or 1364 of this title,

(D) each employer who is or may be liable to the plan under section[2] part 1 of subtitle E of this subchapter,

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[2] So in original.

(E) each employer who has an obligation to contribute, within the meaning of section 1392(a) of this title, under a multiemployer plan, and

(F) each employee organization which, for purposes of collective bargaining, represents plan participants employed by an employer described in subparagraph (C), (D), or (E).

(3) Except to the extent inconsistent with the provisions of this chapter, or as may be otherwise ordered by the court, a trustee appointed under this section shall be subject to the same duties as those of a trustee under section 704 of title 11, and shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 1002 of this title and under section 4975(e) of title 26 (except to the extent that the provisions of this subchapter are inconsistent with the requirements applicable under part 4 of subtitle B of subchapter I of this chapter and of such section 4975).

(e) Filing of application notwithstanding pendency of other proceedings

An application by the corporation under this section may be filed notwithstanding the pendency in the same or any other court of any bankruptcy, mortgage foreclosure, or equity receivership proceeding, or any proceeding to reorganize, conserve, or liquidate such plan or its property, or any proceeding to enforce a lien against property of the plan.

(f) Exclusive jurisdiction; stay of other proceedings

Upon the filing of an application for the appointment of a trustee or the issuance of a decree under this section, the court to which an application is made shall have exclusive jurisdiction of the plan involved and its property wherever located with the powers, to the extent consistent with the purposes of this section, of a court of the United States having jurisdiction over cases under chapter 11 of title 11. Pending an adjudication under subsection (c) of this section such court shall stay, and upon appointment by it of a trustee, as provided in this section such court shall continue the stay of, any

pending mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the plan or its property and any other suit against any receiver, conservator, or trustee of the plan or its property. Pending such adjudication and upon the appointment by it of such trustee, the court may stay any proceeding to enforce a lien against property of the plan or any other suit against the plan.

(g) Venue

An action under this subsection may be brought in the judicial district where the plan administrator resides or does business or where any asset of the plan is situated. A district court in which such action is brought may issue process with respect to such action in any other judicial district.

(h) Compensation of trustee and professional service personnel appointed or retained by trustee

(1) The amount of compensation paid to each trustee appointed under the provisions of this subchapter shall require the prior approval of the corporation, and, in the case of a trustee appointed by a court, the consent of that court.

(2) Trustees shall appoint, retain, and compensate accountants, actuaries, and other professional service personnel in accordance with regulations prescribed by the corporation.

29 U.S.C. § 1344. Allocation of assets

(a) Order of priority of participants and beneficiaries

In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

(3) Third, in the case of benefits payable as an annuity—

(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

(4) Fourth—

(A) to all other benefits (if any) of individuals under the plan guaranteed under this subchapter (determined without regard to section 1322b(a) of this title), and

(B) to the additional benefits (if any) which would be determined under subparagraph (A) if section 1322(b)(5) of this title did not apply.

For purposes of this paragraph, section 1321 of this title shall be applied without regard to subsection (c) thereof.

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

(b) Adjustment of allocations; reallocations; mandatory contributions; establishment of subclasses and categories

For purposes of subsection (a) of this section—

(1) The amount allocated under any paragraph of subsection (a) of this section with respect to any benefit shall be properly adjusted for any allocation of assets with respect to that benefit under a prior paragraph of subsection (a) of this section.

(2) If the assets available for allocation under any paragraph of subsection (a) of this section (other than paragraphs (5) and (6)) are insufficient to satisfy in full the benefits of all individuals which are described in that paragraph, the assets shall be allocated pro rata among such individuals on the basis of the present value (as of the termination date) of their respective benefits described in that paragraph.

(3) This paragraph applies if the assets available for allocation under paragraph (5) of subsection (a) of this section are not sufficient to satisfy in full the benefits of individuals described in that paragraph.

(A) If this paragraph applies, except as provided in subparagraph (B), the assets shall be allocated to the benefits of individuals described in such paragraph (5) on the basis of the benefits of individuals which would have been described in such paragraph (5) under the plan as in effect at the beginning of the 5-year period ending on the date of plan termination.

(B) If the assets available for allocation under subparagraph (A) are sufficient to satisfy in full the benefits described in such subparagraph (without regard to this subparagraph), then for purposes of subparagraph (A), benefits of individuals described in such

subparagraph shall be determined on the basis of the plan as amended by the most recent plan amendment effective during such 5-year period under which the assets available for allocation are sufficient to satisfy in full the benefits of individuals described in subparagraph (A) and any assets remaining to be allocated under such subparagraph shall be allocated under subparagraph (A) on the basis of the plan as amended by the next succeeding plan amendment effective during such period.

(4) If the Secretary of the Treasury determines that the allocation made pursuant to this section (without regard to this paragraph) results in discrimination prohibited by section 401(a)(4) of title 26 then, if required to prevent the disqualification of the plan (or any trust under the plan) under section 401(a) or 403(a) of title 26, the assets allocated under subsections (a)(4)(B), (a)(5), and (a)(6) of this section shall be reallocated to the extent necessary to avoid such discrimination.

(5) The term "mandatory contributions" means amounts contributed to the plan by a participant which are required as a condition of employment, as a condition of participation in such plan, or as a condition of obtaining benefits under the plan attributable to employer contributions. For this purpose, the total amount of mandatory contributions of a participant is the amount of such contributions reduced (but not below zero) by the sum of the amounts paid or distributed to him under the plan before its termination.

(6) A plan may establish subclasses and categories within the classes described in paragraphs (1) through (6) of subsection (a) of this section in accordance with regulations prescribed by the corporation.

(c) Increase or decrease in value of assets

Any increase or decrease in the value of the assets of a single-employer plan occurring during the period beginning on the later of (1) the date a trustee is appointed under section

1342(b) of this title or (2) the date on which the plan is terminated is to be allocated between the plan and the corporation in the manner determined by the court (in the case of a court-appointed trustee) or as agreed upon by the corporation and the plan administrator in any other case. Any increase or decrease in the value of the assets of a single-employer plan occurring after the date on which the plan is terminated shall be credited to, or suffered by, the corporation.

(d) Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets

(1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if—

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

(2)(A) In determining the extent to which a plan provides for the distribution of plan assets to the employer for purposes of paragraph (1)(C), any such provision, and any amendment increasing the amount which may be distributed to the employer, shall not be treated as effective before the end of the fifth calendar year following the date of the adoption of such provision or amendment.

(B) A distribution to the employer from a plan shall not be treated as failing to satisfy the requirements of this paragraph if the plan has been in effect for fewer than 5 years and the plan has provided for such a distribution since the effective date of the plan.

(C) Except as otherwise provided in regulations of the Secretary of the Treasury, in any case in which a transaction described in section 1058 of this title occurs, subparagraph (A) shall continue to apply separately with respect to the amount of any assets transferred in such transaction.

(D) For purposes of this subsection, the term "employer" includes any member of the controlled group of which the employer is a member. For purposes of the preceding sentence, the term "controlled group" means any group treated as a single employer under subsection (b), (c), (m) or (o) of section 414 of title 26.

(3)(A) Before any distribution from a plan pursuant to paragraph (1), if any assets of the plan attributable to employee contributions remain after satisfaction of all liabilities described in subsection (a) of this section, such remaining assets shall be equitably distributed to the participants who made such contributions or their beneficiaries (including alternate payees, within the meaning of section 1056(d)(3)(K) of this title).

(B) For purposes of subparagraph (A), the portion of the remaining assets which are attributable to employee contributions shall be an amount equal to the product derived by multiplying—

(i) the market value of the total remaining assets, by

(ii) a fraction—

(I) the numerator of which is the present value of all portions of the accrued benefits with respect to participants which are derived from participants' mandatory contributions (referred to in subsection (a)(2) of this section), and

(II) the denominator of which is the present value of all benefits with respect to which assets are allocated under paragraphs (2) through (6) of subsection (a) of this section.

(C) For purposes of this paragraph, each person who is, as of the termination date—

(i) a participant under the plan, or

(ii) an individual who has received, during the 3-year period ending with the termination date, a distribution from the plan of such individual's entire nonforfeitable benefit in the form of a single sum distribution in accordance with section 1053(e) of this title or in the form of irrevocable commitments purchased by the plan from an insurer to provide such nonforfeitable benefit,

shall be treated as a participant with respect to the termination, if all or part of the nonforfeitable benefit with respect to such person is or was attributable to participants' mandatory contributions (referred to in subsection (a)(2) of this section).

(4) Nothing in this subsection shall be construed to limit the requirements of section 4980(d) of title 26 (as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990) or section 1104(d) of this title with respect to any distribution of residual assets of a single-employer plan to the employer.

26 C.F.R. § 1.414(l)-1 Mergers and consolidations of plans or transfers of plan assets.

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(2) *General rule*. Under section 414(l),

(i) A trust which forms a part of a plan will not constitute a qualified trust under section 401, and

(ii) A plan will not be treated as being qualified under section 403(a) and 405(a), unless, in the case of a merger or consolidation (as defined in paragraph (b)(2) of this section), or a transfer of assets or liabilities (as defined in paragraph (b)(3) of this section), the following condition is satisfied. This condition requires that each participant receive benefits on a

termination basis (as defined in paragraph (b)(5) of this section) from the plan immediately after the merger, consolidation or transfer which are equal to or greater than the benefits the participant would receive on a termination basis immediately before the merger, consolidation, or transfer.

(b) *Definitions*. For purposes of this section:

(1) *Single plan*. A plan is a "single plan" if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries. For purposes of the preceding sentence, all the assets of a plan will not fail to be available to provide all the benefits of a plan merely because the plan is funded in part or in whole with allocated insurance instruments. A plan will not fail to be a single plan merely because of the following:

(i) The plan has several distinct benefit structures which apply either to the same or different participants,

(ii) The plan has several plan documents,

(iii) Several employers, whether or not affiliated, contribute to the plan,

(iv) The assets of the plan are invested in several trusts or annuity contracts, or

(v) Separate accounting is maintained for purposes of cost allocation but not for purposes of providing benefits under the plan.

However, more than one plan will exist if a portion of the plan assets is not available to pay some of the benefits. This will be so even if each plan has the same benefit structure or plan document, or if all or part of the assets are invested in one trust with separate accounting with respect to each plan.

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(c) *Application of section 414(l)*—(1)

Two or more plans. (i) Section 414(l) does not apply unless more than a single plan is involved. It also does not apply

unless at least a single plan assumes liabilities from another plan or obtains assets from another plan (as in a merger or spinoff). For purposes of section 414(l), a transfer of assets or liabilities will not be deemed to occur merely because a defined contribution plan is amended to become a defined benefit plan. This rule will apply even if, under the facts and circumstances of a particular case, a termination of the defined contribution plan will be considered to have occurred for purposes of other provisions of the Code.

(ii) The requirements of this subparagraph may be illustrated as follows:

Example. After acquiring Corporation B, Corporation A amends Corporation B's defined benefit plan (Plan B) to provide the same benefits as Corporation A's defined benefit plan (Plan A). The assets of Plan B are transferred to the trust containing the assets of Plan A in such a manner that the assets of each plan: (1) are separately accounted for, and (2) are not available to pay benefits of the other plan. Because of condition (2) there are still two plans and, therefore, a merger did not occur. As a result, section 414(l) does not apply. If at some later date Corporation A were to sell Corporation B and transfer the assets of Plan B that were separately accounted for to another trust or to an annuity contract solely for the purpose of providing Plan B's benefits, this transfer would also not involve section 414(l). This is so because Plan B was a separate plan before the entire transaction and because no plan assumed liabilities or obtained assets from another plan. If, on the other hand, Corporation A merged Plan A and Plan B at the time of the acquisition of Corporation B by deleting condition (2) above, then section 414(l) would apply both to the merger of Plan A and Plan B and to the spinoff of Plan B from the merged plan. The spinoff would have to satisfy the requirements of paragraph (n) of this section, even if the assets attributable to Plan A and Plan B were separately accounted for in order to allocate funding costs.

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29 C.F.R. § 4041.1 Purpose and scope.

This part sets forth the rules and procedures for terminating a single-employer plan in a standard or distress termination under section 4041 of ERISA, the exclusive means of voluntarily terminating a plan.

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN and RICHARD E. HOOK,

Plaintiffs,

v.

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Defendants.

COMPLAINT FOR ENFORCEMENT OF RIGHTS UNDER ERISA

Plaintiffs, by their undersigned attorneys, complain as follows:

NATURE OF THE ACTION

1. This is a class action for breach of statutory and fiduciary duties and to enforce the rights of pension plan participants arising under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 USC §§ 1001 et.seq. and under the terms of the plan. The Plaintiffs, retired participants in the defendant Hughes Non-Bargaining Retirement Plan (the "Plan"), seek an order and judgment declaring that they have a vested right to all or a portion of the excess Plan assets and requiring the Defendants to utilize all or a portion of such excess Plan assets to provide plaintiffs and the class they represent with improved pension benefits,

together with an award of attorney's fees and the costs of the action.

2. Plaintiffs and the class they represent, during the term of their active employment with Hughes, made periodic mandatory contributions to the Plan. Over the years, as a result of these employee and employer contributions and of investment growth earned by the contributions, a substantial surplus accumulated in the Plan, that is, the value of the Plan assets far exceeded the pension liabilities.

3. As a result of this accumulated excess Hughes, after being acquired by the General Motors Corporation, ceased making contributions to the Plan and has not made any contributions since 1986, utilizing excess Plan assets to meet its funding obligations. During the same period of time that Hughes made no contributions, participating active employees were required to continue to make contributions to the Plan and are required to continue to do so to date. Effective January 1, 1991, Hughes created a new non-contributory plan and terminated new enrollment in the contributory Plan.

4. Plaintiffs contend that the exclusive utilization of the excess pension assets by the defendants for their sole use and benefit is in violation of various provisions of ERISA and part of an unlawful plan to obtain for Hughes' own use, Plan assets belonging to and dedicated to the exclusive benefit of plaintiffs and the class they represent. Plaintiffs' further contend that the Plan was terminated on January 1, 1991, entitling the participants to an equitable distribution of the surplus assets in the form of improved benefits.

PARTIES

5. Defendant Hughes Aircraft Company ("Hughes") is a corporation which does business at Tucson, Arizona.

6. Defendant Hughes Non-Bargaining Retirement Plan (the "Plan"), is an employee benefit pension plan as defined in Section 2(3) of ERISA, 29 U.S.C. § 1002(3). The Plan does business in Tucson, Arizona. The Plan is sponsored by Hughes

which is an employer, employee benefit plan sponsor and plan administrator pursuant to Section 3(5) and (16) of ERISA, 29 U.S.C. § 1002(5) and (16).

7. Plaintiffs Stanley I. Jacobson, Daniel P. Welsh, Robert E. McMillin, Ernest O. Blandin and Richard E. Hook are retired employees of Hughes and are participants in and beneficiaries of the Plan as defined in Section 3(7) and (8) of ERISA, 29 U.S.C. §§ 1002(7) and (8). Plaintiffs reside in Tucson, Arizona.

JURISDICTION AND VENUE

8. The Court has jurisdiction pursuant to Sections 409(a) and 502(a), (e) of ERISA, 29 U.S.C. § 1114(a) and, 1132(a), (e) and under 28 U.S.C. §§ 1331 and 1337.

9. Venue is proper pursuant to Section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2) because the Plan does business and the Defendants reside or may be found in this District.

CLASS ACTION ALLEGATIONS

10. This action is commenced pursuant to Fed. Rules Civil Pro. Rule 23(b)(1) & (2) as a class action on behalf of a class consisting of all participants of the Plan who are or may become eligible to receive retirement benefits under the Plan.

11. The class members are so numerous that joinder of all persons is impracticable. The class consists of over 10,000 members. There are questions of law and fact common to the class such as (a) whether a termination of the Plan has occurred requiring the equitable distribution of surplus assets to Plan participants; and (b) whether defendants have breached their fiduciary obligations under ERISA by utilizing surplus Plan assets attributable to employee contributions for the sole and exclusive benefit of Hughes rather than for the benefit of Plan participants.

12. The claims of the representative parties are typical of the claims of the classes, and the representative parties will fairly and adequately represent the interests of the classes.

Plaintiffs Stanley Jacobson, Daniel Welsh, Robert E. McMillin, Ernest O. Blandin and Richard E. Hook are participants in the Pension Plan. They were all employed by Hughes for over 5 years prior to their retirements. Their claims are typical of those of the class members.

MATERIAL FACTS

13. Hughes is an aerospace and electronics systems manufacturing company. It was acquired by the General Motors Corporation in 1985 and became a subsidiary of the GM Hughes Electronics Corporation which is a wholly owned subsidiary of the General Motors Corporation.

14. The Plan is one of two plans resulting from the split of the Hughes Retirement Plan, originally effective January 1, 1955, and subsequently amended from time to time. The other plan resulting from the split is the Hughes Bargaining Retirement Plan.

15. The Plan is governed and its terms are evidenced by an agreement executed by Hughes on or about January 1, 1980 and thereafter amended from time to time. The Plan is a qualified pension plan which is intended to comply with the provisions of ERISA and of Section 401 and other applicable provisions of the Internal Revenue Code.

16. Effective January 1, 1991 the Plan was terminated and replaced by a new non-contributory plan covering all non-bargaining employees employed after August 1, 1990 and all non-bargaining employees employed prior to August 1, 1990 who elected not to participate in the Plan. The termination of the contributory Plan and the terms of the new non-contributory plan are evidenced by a document executed by Hughes on April 4, 1991.

17. The Plan provides retirement benefits to eligible retired non-bargaining (non-union) Hughes employees who participated in the Plan and to their eligible beneficiaries, including the plaintiffs.

18. Under the terms of Section 3.4 of the Plan, as a condition of admission to and continued active participation in the Plan, each participant was required to make a contribution to the Plan. In most instances, such contributions were withheld from the participants' pay by the company during each payroll period.

19. Under the terms of Section 3.1 of the Plan, the cost of benefits under the Plan, to the extent not provided by contributions of Participants as provided by contributions of the company not less than in such amounts and at such times as are necessary to fund benefits under the Plan.

20. Under the terms of Section 3.7 of the Plan the administrator is required to maintain a participant Contributions Account for each participant who has made contributions to the Plan.

21. Commencing in 1974 (the year ERISA was enacted) the following contributions to the Plan were made by the active participants and by the company:

Plan Year	Employee	Employer
1974	13,621,214	27,242,428
1975	15,462,525	36,338,253
1976	19,955,945	50,575,021
1977	18,086,393	49,643,953
1978	20,701,322	65,044,140
1979	22,552,274	60,609,646
1980	22,606,766	59,789,473
1981	26,088,475	82,512,517
1982	30,882,960	47,137,426
1983	36,292,781	92,571,925

Plan Year	Employee	Employer
1984	39,265,444	82,300,148
1985	38,718,786	24,139,676
1986	30,359,559	20,782,539
1987	44,981,446	0
1988	43,245,527	0
1989	47,317,008	0
1990	42,915,410	0
TOTAL	**513,053,835**	**698,687,145**

22. At the end of the 1990 Plan year (December 31, 1990) employee contributions since 1974 totaled $513,053,835 and employer contributions totaled $698,687,145.

23. As a result of these contributions and of investment growth of both employer and employee contributions to the Plan, a very substantial overfunding has occurred. By the end of 1985 Plan year assets exceeded the actuarial (present value of accrued benefits) (PVAB) by almost one billion ($1,000,000,000) dollars. As of December 31, 1986, the current value of assets accumulated in the Plan was $2,840,371,000 whereas the present value of accumulated benefits (vested and non-vested) was $1,732,124,000 leaving a surplus in excess of one billion ($1,000,000,000) dollars. The following shows the net Plan assets (assets available for benefits) and benefit liabilities (present value of accumulated benefits, vested and non-vested) since 1986 at the beginning of each Plan year:

Plan Year	Net Assets	PVAB	Excess
1986	2,421,752,000	1,448,529,000	973,223,000
1987	2,840,371,000	1,732,124,000	1,108,247,000
1988	2,993,728,000	1,833,520,000	1,160,208,000
1989	3,286,400,000	2,095,377,000	1,191,023,000
1990	3,853,602,000	2,644,837,000	1,208,765,000

24. At the time General Motors acquired Hughes, on December 31, 1985, the Plan already had accumulated a substantial overfunding. At the same time, the General Motors retirement plan was enormously underfunded. GM's current plan underfunding exceeded seven billion ($7,000,000,000) dollars and was listed by the Pension Benefit Guaranty Corporation as one of the most underfunded pension plans in the country.

25. Shortly after GM acquired control, Hughes ceased making any contributions to the Plan. No Hughes contributions were made from 1986 to the 1990 Plan year. During the same period of time Hughes has continued to require employee contributions. Hughes, under GM's control, has in effect utilized the surplus Plan assets to meet its funding obligations even though a substantial portion of that surplus was generated by employee contributions and their earnings.

26. In 1989 Hughes amended the Plan to provide for an Operational Transition Plan (OTP) wihich provided significant additional retirement benefits out of Plan assets to certain eligible employees. The purpose of the OTP was to induce certain active employed Plan participants to elect early retirement so as to reduce the workforce and Hughes payroll costs. OTP benefits were made available only to participants who were active employees at the time of the adoption of the

OTP amendment who met certain arbitrary requirements established by Hughes and were not made available to employees who retired prior to the adoption of the OTP amendment or who did not meet the arbitrary requirements.

27. In 1990, Hughes announced that it was creating a new non-contributory retirement plan, effective January 1, 1991, for non-bargaining employees and terminating future enrollment in the contributory Plan. All new salaried employees will automatically become participants in the new non-contributory plan and active employees who were participants in the contributory Plan were given the option of becoming participants in the new non-contributory plan. Active salaried employees who were not participants in the contributory Plan were given the option of joining the Plan or automatically becoming participants in the new non-contributory plan. Effective January 1, 1991 no new participants will be enrolled in the contributory Plan.

28. The retirement benefits provided under the new non-contributory plan are significantly less costly than the benefits provided under the contributory Plan.

29. By creating such a new non-contributory plan Hughes will not have to make any further contributions on behalf of participants of the contributory Plan as the assets of the Plan are substantially in excess of those required to fund all current and future pensions of participants of the contributory Plan.

30. Hughes will not be required to make any further contributions to fund benefits of participants of the contributory Plan but may instead improperly attempt to utilize such surplus Plan assets to fund benefits of participants in the new non-contributory plan.

AS FIRST CAUSE OF ACTION
PURSUANT TO SECTION 403(c)(1) OF ERISA

31. ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1) provides that the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries.

32. Defendants have violated Section 403 of ERISA by utilizing excess Plan assets attributable to employer and employee contributions for the sole and exclusive benefit of the employer and to the detriment of plaintiffs and the class they represent.

AS A SECOND CAUSE OF ACTION
PURSUANT TO SECTION 404 OF ERISA

33. Defendants owe Plaintiffs and the class they represent the fiduciary duty pursuant to ERISA § 404, (a)(1)(A)(B) 29 U.S.C. § 1104, (A)(1)(A)(B) to discharge their duties for the exclusive purpose of providing benefits to participants and their beneficiaries and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

34. Defendants breached their fiduciary duty to the plaintiffs and the class they represent by utilizing excess Plan assets attributable to employer and employee participant contributions for the exclusive benefit of defendant Hughes rather than for the benefit of Plan participants and their beneficiaries.

AS A THIRD CAUSE OF ACTION
PURSUANT TO ERISA § 1033 & 1034

35. ERISA § 203(a), 29 USC § 1053(a), requires that employees be 100% vested in their *own contributions* to a pension plan and that pursuant to 29 U.S.C. § 1053(a)(1), "an

employee's rights in his accrued benefits derived from his own contributions are non-forfeitable."

36. Defendants violated ERISA § 203 by using assets attributable to employees own contributions to meet defendants funding obligations and have therefore caused a divestiture and forfeiture of rights.

AS A FOURTH CAUSE OF ACTION
PURSUANT TO ERISA § 4404

37. ERISA § 4404, 29 U.S.C. § 1344 provides for the distribution of excess plan assets attributable to employer and employees contribution in the event that a plan is terminated.

38. ERISA § 4404(d)(3)(B)), 29 USC § 1344(d)(3) (B), provides that all residual assets attributable to employee contributions must be distributed to employees.

39. ERISA § 4404(d)(1), 29 U.S.C. § 1344(d)(1)), provides that the Employer may revert excess assets to itself only if:

i. All liabilities of the plan have been satisfied;

ii. The distribution does not contravene any provision; and

iii. The plan provides for such reversion.

40. ERISA § 4404(d)(1), 29 U.S.C. § 1344(d)(2)(A) (B) (the "Pension Protection Act") provides that any amendment to the plan which permits reversion of surplus assets to the employer upon termination of the plan or increases the amount of the reversion shall not be effective until five years after the amendment was adopted (unless the plan is less than 5 years old in which case if the plan always had the reversion provision it is effective).

41. Under the provisions of ERISA § 4404(D)(3)(A), 29 U.S.C. § 1344(d)(3)(A), before any surplus Plan assets can be distributed to the employer any surplus assets attributable to employee contributions must first be "equitably distributed" to

the employees who made the contributions or to their beneficiaries.

42. Defendants, by creating a new non-contributory plan for all salaried employees employed on or after January 1, 1991 and for all salaried employees employed prior to January 1, 1991 who did not elect to participate in the Plan have, effective January 1, 1991 terminated the Plan within the meaning of ERISA § 4404, 29 USC § 1344 and as such are required to distribute excess assets attributable to employee contribution to the Plan participants in accordance with ERISA § 4404, 29 USC § 1344.

43. The Plan does not contain any provision for reversion of excess assets to the employer upon termination and therefore all excess assets attributable to employer contributions must also be distributed to the participants.

AS AND FOR A FIFTH CAUSE OF ACTION
PURSUANT TO § 403-405 OF ERISA

44. ERISA §§ 403, 404 & 405, 29 USC §§ 1103, 1104 & 1105 impose certain fiduciary duties upon plan fiduciaries.

45. ERISA § 403(c)(1), 29 USC § 1103(c)(1) requires that plan assets "shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

46. ERISA § 404(1)(A), 29 USC § 1104(1)(A) provides that plan fiduciaries shall expend fund assets for the exclusive purpose of "providing benefits to participant and their beneficiaries" and for "defraying reasonable expenses of administering the plan."

47. ERISA 406(a)(1)(D), 29 USC § 1106(a)(1)(D) prohibits plan fiduciaries to "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan."

48. Section 6.5(b) of the Plan provides that no amendment shall be made at any time under which any part of the Trust

Fund may be diverted to purposes other than for the exclusive benefit of the participants and their beneficiaries.

49. The defendants intend to divert assets of the Plan to pay benefits to participants of the new non-contributory plan who are not participants in the Plan.

50. Paying benefits from assets of the Plan to persons who are not participants of the Plan would be in violation of ERISA §§ 403 and 404, 29 USC §§ 1103 and 1104 and of Section 6.5(d) of the Plan which prohibit using Plan assets for anyone other than Plan participants and their beneficiaries.

51. Paying benefits from assets of the Plan to participants of the new non-contributory plan constitutes a unlawful transfer of assets from the Plan to the new plan for the benefit of defendant Hughes, a party in interest as defined in ERISA § 3(14), 29 USC § 1002(14), which, under the terms of the new non-contributory plan, is required to fund all such benefits. Such a transfer of assets is prohibited by ERISA § 406(a)(1)(D), 29 USC § 1106(a)(1)(D).

AS AND FOR A SIXTH CAUSE OF ACTION
PURSUANT TO ARTICLE V § 5.2 OF THE PLAN

52. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1) (D) provides that the plan fiduciaries shall carry out their duties "in accordance with the documents and instruments governing the plan."

53. ERISA § 502(a)(1)(B) provides, in part, that a plan participant or beneficiary may bring an action to "enforce his rights under the terms of the plan."

54. Article V § 5.2 of the Plan provides in relevant part that the "Plan shall be administered, interpreted and applied fairly and equitably and in accordance with the specified purpose of the Plan."

55. Defendants provided OTP benefits out of Plan assets in a discriminatory manner by making such benefits available only to certain participants who were active employees of

Hughes at the time of the adoption of the OTP amendment and not to existing retirees and certain other Plan participants. Defendants, by providing OTP benefits in such a discriminatory manner, breached the terms of Article V § 5.2 of the Plan and of ERISA.

RELIEF

56. Wherefore Plaintiffs request a judgment against the Defendants:

a. Equitably distributing all excess Plan assets attributable to employer contributions to the Plan participants in the form of improved benefits;

b. Equitably distributing all excess Plan assets attributable to employee contributions to Plan participants in the form of improved benefits;

c. Enjoining the defendants from using or diverting any assets of the Plan for the purposes of paying benefits under or administering the non-contributory plan;

d. Appointing a neutral trustee to administer the Plan in accordance with the provisions of ERISA and the judgment of this Court;

e. Ordering the defendant Hughes Aircraft Company to restore to the Plan all Plan assets used to pay OTP benefits and/or pension benefits to persons who are not participants of the contributory Plan.

f. Awarding plaintiffs reasonable attorneys fees, costs and disbursements incurred in connection with the prosecution of this action;

g. Granting such other and further relief as the Court deems equitable, just and proper.

SERVICE REQUIRED BY ERISA

57. A copy of this Complaint has been served on the Secretary of Labor and Secretary of the Treasury pursuant to Section 502(h) of ERISA, 29 U.S.C. § 1132(h).

Dated: New York, New York
January 17, 1992

Yours, etc.
JEROME TAUBER, A Member of
SIPSER, WEINSTOCK, HARPER & DORN

/s/ Jerome Tauber
JEROME TAUBER

- and -

SALLY HART WILSON, of
BOGUTZ AND GORDON, P.C.

/s/ Sally Hart Wilson
SALLY HART WILSON
Attorneys for Plaintiffs

APPENDIX H

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN and RICHARD E. HOOK,

Plaintiffs,

v.

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Defendants.

CASE NO. CIV-92-031-TUC JMR

DECLARATION OF ANN L. VERHEY IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS, FOR A MORE DEFINITE STATEMENT AND TO STRIKE PORTIONS OF THE COMPLAINT

I, Ann L. Verhey, hereby declare as follows:

1. I am a citizen of the United States and a resident of Los Angeles, California. I am presently employed by Hughes Aircraft Company ("Hughes") in the position of Assistant Treasurer, and I have been employed by Hughes since 1983. I have either personal knowledge of or access to records containing the facts set forth in this Declaration and, if called as a witness, could and would competently testify about them under oath.

2. I have held the position of Assistant Treasurer at Hughes since January 1988. In this position I am responsible for administering the financial aspects of Hughes' benefit and

insurance programs, including the retirement plan for non-bargaining employees. Records concerning the Hughes Non-Bargaining Retirement Plan (the "Plan"), including copies of the Plan itself and its amendments, are maintained under my direction and control. These records are maintained in the ordinary course of business and I utilize these records in performing my functions for Hughes.

3. Attached hereto as Exhibit "1" and incorporated herein by this reference is a true and correct copy of the Hughes Non-Bargaining Retirement Plan as it existed in 1990, or just prior to the amendments which became effective January 1, 1991. At the end of 1990 the Plan consisted of the Plan executed on October 30, 1985, an amendment executed on December 23, 1986, an amendment executed on March 29, 1988, and an amendment executed on November 28, 1989. The Plan is a defined benefit plan and, as of 1990, provided a contributory benefit structure only.

4. Attached hereto as Exhibit "2" and incorporated herein by this reference is a true and correct copy of the Hughes Non-Bargaining Retirement Plan as amended effective January 1, 1991. The Plan as executed on April 4, 1991, remains a single defined benefit plan and is amended to provide two benefit structures, one of which is a contributory benefits structure and the other of which is a non-contributory benefits structure.

5. In the Fall of 1990, the active employee participants in the Plan were given the opportunity to elect either the contributory benefits structure or the non-contributory benefits structure of the Plan to become effective January 1, 1991. In fact, in 1990 approximately 2% of the employee participants participating in the contributory benefits structure elected to change to the non-contributory benefits structure. As of the beginning of 1991, approximately 66,000 Plan participants were accruing benefits under, receiving benefits under, or were terminated employees with vested benefits in, the contributory benefits structure.

I declare, under penalty of perjury under the laws of the state of California and the United States of America, that the foregoing is true and correct. This Declaration is executed on March 12, 1992, at Los Angeles, California.

/s/ Ann L. Verhey
ANN L. VERHEY

APPENDIX I

W Watson Wyatt
Worldwide

Watson Wyatt & Company
Research and Information Center
Suite 800
6707 Democracy Boulevard
Bethesda, MD 20817-1129

Telephone 301 581 4600
Fax 301 581 4688

January 23, 1998

Mr. Kenneth W. Starr
Kirkland & Ellis
Suite 1200
655 Fifteenth Street, N.W.
Washington, DC 20005

Dear Mr. Starr:

We estimate that contributory defined benefit pension plans in the United States in which employees' contributions are at least $200 per year per active participant possess at least $60.7 billion in assets and cover at least 1.3 million workers and retirees. These estimates are probably somewhat understated. We obtained them by sorting a Form 5500 data file and identifying plans that showed that employees had made significant contributions. A copy of the data sort is attached.

As you know, I work with Watson Wyatt Worldwide, which is a global benefits consulting firm. Watson Wyatt obtained its pension plan data from the U.S. Department of Labor as a public use data file of 1994 Form 5500 filings. This file included only about 80% of all defined benefit pension plans with more than 100 participants, because approximately 20% of such plans had not yet been entered into the public use file when we purchased it.

Assuming that the plans for which we have data are representative of those for which we do not, we estimate that contributory defined benefit pension plans possess approximately $66.8 billion in assets and cover approximately 1.5 million American workers and retirees. We reached these estimates by inflating the number of participants and value of assets to reflect the undercount of plans. Before doing this, we subtracted the participants and assets of two large plans from the preliminary estimates above to avoid overstating the effect of the undercount. These two plans when combined had 565,000 participants and $37.4 billion in assets. The results were inflated to reflect to undercount of plans, and the participants and assets of the two large plans were added back to give the estimates above.

Sincerely,

/s/ Richard Joss

Richard Joss
Resource Actuary

RJ/jll